Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHRISTOPHER TODD BROWN,
Petitioner,

vs.

CHARLES LI, HENRY YANG, GALEN STUCKEY, DANIEL E. MORSE, FRED LANGE, AND SARAH PRITCHARD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the restrictive First Amendment standard of *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260 (1988), allowing educators broad discretion in regulating the speech of children and adolescents, applies when a state university punishes a graduate student for his speech?

2. Whether the First Amendment is violated when a university denies a graduate student his Master's degree to punish his criticism of university personnel and government officials in the acknowledgment section of his Master's thesis when there is no claim of disruption of university activities and no question that the student fulfilled all requirements for the degree?

PARTIES TO THE PROCEEDING

Petitioner Christopher Todd Brown was the plaintiff in the District Court and appellant in the Court of Appeals for the Ninth Circuit. Defendants were the Dean of the Graduate Division of the University of California Santa Barbara (Charles Li), the Chancellor of the university (Henry Yang), three Professors teaching in science departments of the university (Galen Stucky, Daniel E. Morse and Fred (Lange), and the Director of the university library (Sarah Pritchard).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Todd Brown respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The District Court's unpublished summary judgment in favor of defendants is included in Appendix at 54a. The District Court's Findings of Facts and Conclusions of Law are included in Appendix D at 56a. The Court of Appeals' opinion (per Graber, concurrence by Ferguson, partial concurrence and partial dissent by Reinhardt), is published, as amended, at 308 F.3d 939 (9th Cir. 2002), and is included in Appendix B at 4a. The Court of Appeals' order denying the petition for rehearing and suggestion for rehearing *en banc* is included in Appendix A at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 2002 and amended on October 24, 2002.[1] Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied on October 1, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(i).

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[1] The amendment was limited to correcting the caption.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law ... abridging the freedom of speech..." U.S. CONST. Amend. I.

STATEMENT OF THE CASE

This Petition raises the issue of whether a state university is entitled to deny a graduate student his Master's degree for one year (and the financial and professional benefits derived therefrom) because petitioner sought to express criticism of university personnel and other government officials related to his graduate school experiences in the acknowledgment section of his Master's thesis. Petitioner's speech in no way disrupted any of the university's functions, nor was it different in style from numerous acknowledgment sections in other graduate theses on file in the university library.[2] The only

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[2] Petitioner filed numerous, representative acknowledgments on file at the university library which demonstrated that acknowledgments were customarily used by graduate students as a forum for wide-ranging, unconstrained extra-curricular speech. ER 184-90, 405-89. References to the "ER" are to the Excerpts of Record in the Court of Appeals. One of these, approved by respondent Stucky, included the following:

> "To: 1) the dips**ts who decided to put the P-chemists on the forth [sic] floor, 2) the inept facilities management monkey who raised the cooling water pressure and 3) the dumb ass who left his cooling water ON for a laser that was OFF for 2 years and subsequently flooded my lab, desk, and my most important files: may your bloated, limb-less bodies wash to shore and be picked clean by seabirds and maggots...Product endorsements: Mark Morey checks the surf exclusively on Netscape 3.0, rides Toobs ™ bodyboards, and is an active member of the Santa

difference is that petitioner's disacknowledgements criticized school officials. Petitioner would not have suffered any adverse action if his disacknowledgements had contained praise of the same school officials. The Ninth Circuit majority employed this Court's deferential standard in *Hazelwood v. Sch. Dist. V. Kuhlmeir*, 484 U.S. 260 (1998), to permit university administrators to engage in this blatant form of viewpoint discrimination.

Petitioner enrolled as a graduate student in the Department of Materials at the University of California Santa Barbara in 1995 and by June 1999 had fulfilled all academic requirements for his Master's degree. This included obtaining approval from petitioner's thesis committee of his Master's thesis, "The Morphology of Calcium Carbonate: Factors Affecting Crystal Growth," which analyzed the crystallizing properties of abalone shells.[3] Professor Stucky, who chaired petitioner's committee, later described petitioner's thesis as "excellent."

On June 11, 1999, petitioner presented his thesis for filing to the Special Collections Department of the university's Davidson Library, as is customary once a thesis is approved. At the beginning of the thesis, petitioner included a section entitled "disacknowledgements," in which petitioner included

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> Barbara and Isla Vista chapters of Surfriders. Wardrobe by ¢rime $pree Loots Suits ™."

ER 190.

[3] University faculty and officials have consistently acknowledged that Petitioner had completed all required courses and assignments for the award of a Master's degree, and admitted that they withheld Petitioner's degree solely on the basis of his refusal to delete his disacknowledegments from the copy of his thesis to be filed in the university library. *See, e.g.*, ER 66, 162.

strong criticisms of certain administrators, as well as former California Governor Pete Wilson.

When a member of the library staff read the "disacknowledgements" petitioner's thesis was not filed, but returned to the Dean of the Graduate Division, defendant Li. Thereafter, petitioner received a letter from the Associate Dean of Students stating that petitioner would not receive his degree unless he removed the disacknowledgements section and apologized to each of the persons mentioned therein. ER 321. The demand that petitioner apologize was later retracted.

Petitioner subsequently sought and obtained a meeting with the Dean of the Graduate Division. The Dean confirmed that petitioner had met all academic requirements for his Master's degree. He nonetheless insisted that the disacknowledgements section of the thesis be removed, characterizing petitioner's criticisms of university personnel as "hate speech."

Petitioner then proffered a revised version of his disacknowledgements, eliminating certain profanity which one of his thesis committee members had told him was objectionable.[4] The revised version still retained the substance of his original criticisms, including (I) expression of frustration with bureaucratic procedures within the graduate division, (2) criticism of the helpfulness of Library staff, (3) criticism of former Governor Pete Wilson's policies that raised tuition and fees fourfold, and (4) criticism of the University Regents for

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[4] In a meeting with petitioner a few days after Professor Stucky became aware of the disacknowledegments, he told petitioner that his principal objection to the disacknowledegments was the use of vulgarity. ER 180-83, 372. Respondent Stucky would not agree to the "unsubstantiated" criticism of a faculty colleague in the disacknowlegments. ER 372-74.

biased and corrupt practices damaging to graduate students.[5]

This version of the disacknowledgements was also rejected by petitioner's thesis committee members and other university officials. One of the thesis committee members refused to consider *any* form of disacknowledgements. Another asserted that no criticism of university personnel was acceptable. The chair of petitioner's committee refused to accept the disacknowledgements because they were "contradictory" to his "personal religious beliefs." ER 212-13, 404–05. At a minimum, the three committee members had three different sets of standards by which they judged the appropriateness of petitioner's disacknowledgements. ER 155-83.

The record clearly indicates that petitioner was denied his degree and punished because he insisted on his right to include such criticism in his acknowledgments and because respondents would not permit such criticism to be included based solely upon content and viewpoint.[6] Had petitioner praised the same administrators he would have been granted his degree and his thesis would have been filed.

Petitioner pursued various appeals to internal university bodies in an attempt to obtain his degree. Each body reiterated that petitioner's Master's degree would be withheld until he removed the disacknowledgements. This continued for nearly a year, during which university officials also placed petitioner on academic probation, making him ineligible for a

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[5] The text of the revised disacknowledegments is included in Appendix E at 64a.

[6] The University's legal counsel suggested that the thesis committee members include a disclaimer indicating that they did not agree with petitioner's disacknowledegments; however, the committee members refused the advice of counsel and would not accept the disacknowledegments in any form. ER 166, 349.

university teaching or research position and fellowship support, as well as preventing him from obtaining employment.

University officials ultimately conferred petitioner's degree several days after they became aware that a national television news report was being prepared for broadcast on the controversy. ER 322.[7] Despite awarding the degree and recognizing the scientific merit of the thesis, university officials still refuse to file petitioner's thesis in the university library. This refusal to file petitioner's thesis deprives others in the scientific community of the benefits of his scholarship and deprives petitioner the recognition in his field such filing would bring.

Petitioner filed suit on June 16, 2000, for damages, declaratory relief and an injunction to compel the university to file petitioner's thesis in the library. After limited discovery, the District Court ruled that respondents were entitled to qualified immunity and granted respondents' summary judgment motion on May 11, 2001. The Court of Appeals affirmed the District Court judgment with respect to petitioner's First and Fourteenth Amendment claims, and remanded the case for consideration of petitioner's state law claims. The Ninth Circuit majority made it clear that none of respondents' actions violated petitioner's First Amendment rights. App. 29a. The majority found no public forum existed and that petitioner's thesis committee had the absolute, essentially unreviewable, authority to impose any standards it chose, including standards based upon viewpoint, in approving thesis acknowledgment sections. App. 27a - 29a.

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[7] Petitioner received notice that his degree was conferred approximately one week after university officials were contacted by ABC personnel regarding the proposed broadcast of a report by Peter Jennings regarding the dispute. ER 245-46, 278.

REASONS FOR GRANTING THE WRIT

This case involves substantial punishment of a graduate student at a state university because he had the temerity to insist on his First Amendment right to include criticism, rather than commonplace praise in the acknowledgment section of his Master's thesis. As the university's own records demonstrated, acknowledgment sections of theses on file in the university library have been an open forum in which students include praise of helpful faculty, thanks to parents and loved ones and a wide range of personal, sometimes oddball, reflections on their school experiences and lives.

The Ninth Circuit majority rejected petitioner's First Amendment claim only by misapplying this Court's deferential standard in *Hazelwood* to the radically different context of graduate student speech.[8] Clearly, petitioner's speech offended the majority in the same manner university administrators were offended. Only by using the *Hazelwood* standard to grant university officials near absolute deference to favor administrative prerogative over freedom of expression, was the majority able to avoid the host of inconvenient facts which would otherwise have entitled

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[8] Judge Graber's explicit adoption of the *Hazelwood* standard must be considered the majority view of the panel and thus the governing standard for university students in the Ninth Circuit. Judge Ferguson's concurrence, though furnishing reasoning different from Judge Graber's, does not challenge Judge Graber's application of the *Hazelwood* standard to student speech in the university context. Indeed, university representatives have publicly described the decision as such. *See* Pam MacLean, "Thanks to My Adviser, May He Rot in Hell -- Free Speech Has its Limits, the 9th Circuit Rules, and One of Them Is the Acknowledgments in a Master's Thesis," S.F. *Daily Journal*, Aug. 13, 2002, in which the University's counsel of record Christopher Patti is quoted: "Graber appears to be writing for a majority, and Ferguson is offering an additional rationale." App. F at 70a.

petitioner to a trial on the merits of his claim that respondents punished him for his adherence to his principles and his right to criticize public officials in this forum.[9]

The Ninth Circuit's approach conflicts with decisions by the First Circuit and Sixth Circuit which explicitly reject the deferential *Hazelwood* standard in the higher education context. Moreover, the First and Sixth Circuit decisions are fully consistent with this Court's acknowledgment in *Hazelwood* itself that such a deferential standard might not be appropriate when applied to the speech of college students. The Ninth Circuit ignored this caution in *Hazelwood* and the reasoning of the First and Sixth Circuits in affirming the right of university administrators to engage in content and viewpoint discrimination by denying petitioner his degree for nearly one year because they disagreed with petitioner's disacknowledgements.

This case provides a timely and appropriate vehicle for this Court to resolve this conflict between the Ninth Circuit and the First and Sixth Circuits and to articulate a First Amendment standard for university level speech recognizing that more mature students on college campuses must be given more freedom to speak than adolescents in high school environment.

The Ninth Circuit's decision also creates nationwide uncertainty about the proper constitutional standard applicable to the speech of college level students. This Court can dispel this uncertainty by announcing a clear rule rejecting the

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[9] Although Judge Ferguson found that petitioner had engaged in some form of academic dishonesty, there was no basis for this conclusion in the record and this was not the basis for the District Court's summary judgment. See App. C at 55a and App. D at 58-63a. The university never charged petitioner with any form of academic dishonesty or with violating any university rules or regulations. The First Amendment issue in this case was clearly presented in the record below.

application of the *Hazelwood* standard in the context of higher education.

I. THE COURT SHOULD GRANT REVIEW BECAUSE THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND DECISIONS OF THIS COURT.

A. The Ninth Circuit's Decision Conflicts With Decisions of the First and Sixth Circuits.

The Ninth Circuit's application of the *Hazelwood* standard to college students' free speech conflicts with the decisions of the First and Sixth Circuits. Recognizing that college students should be afforded greater First Amendment protection than elementary and high school students, both the First and Sixth Circuits, unlike the majority in this case, expressly declined to apply the *Hazelwood* standard to college student speech.

In *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (*en banc*), a university attempted to censor college student speech contained in the school yearbook by withholding its publication. In refusing to apply the *Hazelwood* standard, the Court emphasized that university students are "less impressionable than younger students" and noted that "[t]he danger of chilling...individual thought and expression...is especially real in the university setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Id* at 352 (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 n.14, and *Rosenberger*, 515 U.S. at 835-36). [10]

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[10] The Ninth Circuit majority decided that the acknowledgment sections of theses were not even a limited public forum. App. 28a. This reasoning is also at odds with the Sixth Circuit's reasoning in *Kincaid*,

Instead of following *Kincaid*, the Ninth Circuit majority relied heavily on the reasoning of *Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995), a prior Sixth Circuit decision in which a junior high school student alleged that her First Amendment rights were violated when her teacher gave her a failing grade on a paper the topic of which the teacher had previously disapproved.[11] It is therefore particularly significant that the Sixth Circuit *rejected* application of the *Hazelwood* standard when dealing with a college student's speech in *Kincaid*. In *Kincaid*, Kentucky University officials withheld publication of a student yearbook because they objected to some of the content as "inappropriate" and irrelevant to the school's activities. In finding that the university's conduct violated students' free speech rights, the court considered and rejected application of the *Hazelwood* standard, observing "in addition to the nature of the university setting, we find it relevant that the editors of the [yearbook] and its readers are likely to be young adults...Thus, there can be no justification for suppressing the yearbook on grounds that it might be 'unsuitable for immature audiences.'" 236 F.3d at 352.

The court in *Kincaid* then contrasted the *Hazelwood* high school context with the college setting of *Widmar v. Vincent*, 454 U.S. 263 (1981), where this Court observed that "University students are, of course, young adults. They are less impressionable than younger students..." *Id.*, quoting *Widmar* at 274, n.14. The *Kincaid* court ruled that

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236 F.3d at 348-354, and with the evidence of how acknowledgment sections have been used by graduate students at the University of California at Santa Barbara. ER 405-489.

[11] This case does not, like *Settle*, involve disagreement over curriculum or course content. In fact, respondents conceded this in their arguments that Petitioner's disacknowledegments were "irrelevant to the scientific content of the thesis."

withholding of the yearbook's distribution as an unconstitutional suppression of student expression, and concluded "We will not sanction a reading of the First Amendment that permits government officials to censor expression...in order to coerce speech that pleases the government." *Id.*, at 355.

The First Circuit has also rejected the application of the *Hazelwood* standard to college student speech in *Student Govt. Ass'n v. Board of Trustees of the Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989). There, students alleged that university officials had abolished a legal services organization, staffed by attorneys and students, in order to impede students from bringing claims against the university. Addressing the issue whether the students' First Amendment rights were violated, the First Circuit expressly disavowed use of the *Hazelwood* standard as inapplicable in the college context. *Id.*

The Ninth Circuit majority attempts to distinguish the First and Sixth Circuit decisions by characterizing the student speech in yearbooks and newspapers as "extracurricular speech" that is entitled to broader First Amendment protection than "curricular" speech.[12] The purported distinction between curricular and extracurricular speech cannot be reconciled with this Court's ruling in *Hazelwood,* which specifically rejected the contention that the high school paper at issue was

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[12] The Ninth Circuit majority characterizes acknowledgment sections as "curricular" speech, likening it to an assignment to write a paper from a particular viewpoint, "...a law-school professor may assign students to write 'opinions' showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question." App. 28a. In this case, Petitioner wrote what was acknowledged to be an "excellent" thesis, and appended to it personal opinions critical of university officials in a section of his thesis customarily used by students to express personal opinions and viewpoints. He was not given an assignment to write his thesis from a particular viewpoint as part of a class exercise.

"extra-curricular" speech subject to different First Amendment scrutiny than "curricular" speech. *Hazelwood*, 484 U.S. at 271.[13]

Nor is a "curricular/extra-curricular" distinction supported by the First and Sixth Circuit cases, which the Ninth Circuit majority acknowledges refused to apply the *Hazelwood* standard to college student speech. App. 21a. The Sixth Circuit decision in *Kincaid* involved school-related student speech (the school yearbook) very similar to the speech at issue in *Hazelwood* (the school newspaper). Indeed, the *Kincaid* Court presumed that the nature of the speech was the same as that in *Hazelwood*. The Sixth Circuit nonetheless ruled that greater First Amendment protection should be accorded college students than high school students, based upon their greater maturity.

The Ninth Circuit majority's attempt to distinguish the Sixth and First Circuit decisions based upon the "curricular" or "extra-curricular" nature of the speech is without basis in those decisions or in the decisions of this Court. The suggestion that different First Amendment standards apply to speech within the purview or control of an educational institution, based upon characterization of the speech as "curricular" or "extra-curricular" is specious.

The Ninth Circuit majority's reliance on this Court's ruling in *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 122 S. Ct. 2559 (2002), is even more misplaced: in a case concerning drug testing for middle and high school students,

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[13] Such a distinction was also rejected by the Ninth Circuit in *Planned Parenthood of Southern Nevada, Inc. v. Clark City Sch. Dist.*, 941 F.2d 817, 827 (9th Circ. 1991) (*en banc*), where the court in evaluating *Hazelwood* concluded that the Supreme Court "intended that the same principles that animate educational decisions ... come into play when determining what advertisements are suitable for publication in school newspapers, yearbooks and athletic programs."

this Court balanced the Fourth Amendment rights of "children, who...have been committed to the temporary custody of the State as schoolmaster" against the school's "responsibilities as guardian and tutor of children entrusted to its care". *Id* at 2565. Reliance on *Earls* for the First Amendment standards to be applied to a *college* student's *speech* (i.e., whether the speech is "curricular" versus "extracurricular") is without support.

Application of the deferential *Hazelwood* standard to the freedom of expression of college students is in clear conflict with the opinions of the First and Sixth Circuits.[14] This Court should resolve this conflict.

B. The Decision Below Is at Odds With This Court's Decisions Recognizing the Broader First Amendment Rights of Post-Secondary School Students.

The Ninth Circuit's reasoning is also inconsistent with this Court's decisions, including the *Hazelwood* decision.

In *Hazelwood* this Court concluded that a high school principal had acted reasonably in addressing student expression directed to adolescent readers when he refused to allow the school newspaper to publish two articles, one dealing with teenage pregnancy and the other discussing the impact of divorce on students at the school. This Court began its analysis with the recognition that the rights of public school students are not automatically coextensive with the rights of adults, and acknowledged that "a school must be able to take into account the emotional maturity of the intended audience

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[14] Indeed, even under the most deferential First Amendment standards petitioner was entitled to a trial on his claim that respondents had punished him because of the viewpoints expressed in his disacknowledgements.

in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." 484 U.S. at 272.

This Court went on to say that the *Hazelwood* standard was consistent with this Court's view that "the education of the Nation's *youth* is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Id.* at 273 (emphasis added). This Court then expressly acknowledged that such a deferential standard might not be appropriately applied to the speech of college students. *Id.* at 273, n. 7.

This Court specifically observed that the circumstances of publication of the school paper were such that the principal reasonably believed that there was no time to consider revising the articles, and that his only choice was to delete the articles altogether. *Id* at 276. This is in sharp contrast to this case, where university officials refused to consider *any* modifications to petitioner's disacknowledgements during a full year in which they withheld his degree and prevented him from obtaining employment within or outside the university. Respondents had ample time to fulfill their constitutional responsibilities; they adamantly refused to do so.

In *Papish v. Board of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973), petitioner was a graduate student who was expelled for distributing on campus a newspaper containing an article entitled "M-----f----- Acquitted." The university's Dean of Students characterized the article as "indecent speech," and "improper on the university campus." A Student Conduct Committee ruled that petitioner had violated the university's General Standards of Student Conduct, which required students "to conduct themselves in a manner compatible with the university's functions and missions as an educational institution" and "to observe

generally accepted standards of conduct" including refraining from "indecent conduct or speech." This Court ruled that university policy could not be used in order to "proscribe this form of expression," and held that petitioner's expulsion violated her First Amendment rights. *Id* at 671.

As in *Papish*, petitioner was an adult graduate student, speaking to adult readers. The university's censorship of petitioner's speech had nothing to do with fulfillment of his academic course work or the quality of his scholarship; it was patently an effort to prevent petitioner from expressing criticism of the university institution and its governors.[15] Respondents simply did not like the views petitioner expressed and they exercised unrestrained power to censor him.

This Court has, on numerous occasions, considered the "delicate issues concerning the academic community," in which "the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process" must be balanced against "the equally significant interest in the widest latitude for free expression and debate...."*Healy v. James*, 408 U.S. 169, 173 (1972).

In doing so, this Court has also long recognized the unique role of institutions of higher learning as "vital centers of the Nation's intellectual life," *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 835 (1995), and stressed that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'", where academic freedom must be safeguarded. *Id* at 836.

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[15] *See Settle*, 53 F.3d at 155. While the court acknowledged that judicial restraint was appropriate "in classroom conflicts between student and teacher over matters falling within the ordinary authority of the teacher over curriculum and course content," the court also stated emphatically that "teachers should not punish or reward people on the basis of inadmissible factors—race, religion, gender, political ideology...". *Id.*

This Court's opinions have consistently observed that an essential component of academic freedom is the right "to participate in the intellectual give and take of campus debate..." *Widmar v. Vincent*, 454 U.S. 263, 268 (1981), *quoting Healy*, 408 U.S. at 181-182, including debate regarding the performance of the academic institution, its educators and administrators. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969).

The standards this Court has fashioned to govern freedom of expression in high schools should not be applied to this nation's universities. The University of California has asserted in this case the broadest possible claims that university officials may engage in viewpoint discrimination in restricting graduate student speech. These claims have now been embraced by the Ninth Circuit. This Court should draw a clear line between high school and higher education in the application of the *Hazelwood* standard. This case is an appropriate and timely vehicle for doing so.

II. THE UNCERTAIN SCOPE OF FIRST AMENDMENT PROTECTION FOR THE SPEECH OF UNIVERSITY STUDENTS CREATED BY THE NINTH CIRCUIT DECISION IS AN ISSUE OF NATIONAL IMPORTANCE JUSTIFYING REVIEW.

California operates the largest higher education system in the nation. The University of California system alone has nearly 200,000 students, of which nearly 40,000 are graduate students.[16] The California State University and California Community Colleges are home to an additional two million students.[17] The reputation for academic rigor and excellence of the University of California system is known to the students of those California colleges and universities, as well as to the students of institutions of higher learning nationwide.[18]

The decision below diminishes the free speech rights of millions of university students in California alone to the rights held by high school students.

The Ninth Circuit majority employed *Hazelwood* to permit university administrators to engage in viewpoint discrimination at odds with fundamental tenets of this Court's

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[16] These statistics may be found on the University of California website. *See http://www.universityofcalifornia.edu/campuses/welcome.html* and *http://universityofcalifornia.edu/academics/campusprograms.html.*

[17] According to the California Post Secondary Education Commission, there are over 2.5 million post-secondary students in California. Of them, approximately 2.3 million attend schools in the California state system.

[18] Nine of the ten campuses of the University of California system are ranked in the top 100 public schools offering an undergraduate liberal arts program. "Top 100 Values in Public Colleges," The Kiplinger Washington Editors, Inc., at Kiplinger.com, Dec. 02, 2002.

First Amendment jurisprudence. *United States v. Eichman*, 496 U.S. 310, 319 (1990), *quoting Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") Such a free speech regime will inspire self-censorship and political correctness and will undermine the unique role of our institutions of higher learning as "vital centers of the nation's intellectual life." *Rosenberger*, 515 U.S. at 835.

Indeed, students at state institutions of higher learning throughout the nation may now rightfully consider successful academic performance to be measured by their ability to mimic, without criticism, the tastes, views, attitudes and beliefs of their professors. They may now justifiably fear academic reprisals, with career-jeopardizing ramifications, simply for expressing views critical of the quality and performance of those institutions or the educators who operate them. In short, the decision threatens to create a non-critical environment in the very place where rigorous thought, and its expression, should be encouraged.

This Court should adopt a clear, national standard by which these, and all of the Nation's public university personnel and students, can govern their conduct. That standard should not be the paternalistic standard adopted by the Ninth Circuit in this case; it should be a standard befitting the need for freedom of speech to flourish in the university setting.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Dated: December 30, 2002

Respectfully submitted,

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APPENDIX A

[Filed October 1, 2002]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHRISTOPHER TODD BROWN,

Plaintiff-Appellant,

v.

CHARLES LI, in his official capacity as Dean, Graduate Division, University of California Santa Barbara; HENRY YANG, in his individual and official capacity as Chancellor, University of California Santa Barbara; GALEN STUCKY, in his individual and official capacity as Professor of Chemistry and Material, University of California Santa Barbara; DANIEL E. MORSE, in his individual capacity and in his official capacity as Professor of Molecular Genetics and Biochemistry, University of California Santa Barbara; FRED LANGE, in his individual and official capacity as Chair of the Materials Department, University of California Santa Barbara; SARAH PRITCHARD, in her individual and in her official capacity as Director of the Davidson Library, University of California Santa Barbara,

Defendants-Appellees.

No. 01-55930

D.C. No. CV-00-06492-RSWL

ORDER

Before: FERGUSON, REINHARDT, and GRABER, Circuit Judges.

Judges Ferguson and Graber have voted to deny the petition for panel rehearing. Judge Reinhardt has voted to grant the petition for panel rehearing. Judges Reinhardt and Graber have voted to deny the petition for rehearing en banc, and Judge Ferguson has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHRISTOPHER TODD BROWN,
Plaintiff-Appellant,

v.

CHARLES LI, in his individual and official capacity as Dean, Graduate Division, University of California Santa Barbara; HENRY YANG, in his individual and official capacity as Chancellor, University of California Santa Barbara; GALEN STUCKY, in his individual and official capacity as Professor of Chemistry and Materials, University of California Santa Barbara; DANIEL E. MORSE, in his individual capacity and in his official capacity as Professor of Molecular Genetics and Biochemistry, University of California Santa Barbara; FRED LANGE, in his individual and official capacity as Chair of the Materials Department, University of California Santa Barbara; SARAH PRITCHARD, in her official capacity as Director of the Davidson Library, University of California Santa Barbara,
Defendants-Appellees.

No. 01-55930

D.C. No. CV-00-06492-RSWL

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
April 9, 2002—Pasadena, California

Filed August 12, 2002
Amended October 24, 2002

Before: Warren J. Ferguson, Stephen Reinhardt, and
Susan P. Graber, Circuit Judges.

Opinion by Judge Graber;
Concurrence by Judge Ferguson;
Partial Concurrence and Partial Dissent by Judge Reinhardt

COUNSEL

Paul L. Hoffman, Schonbrun Desimone Seplow Harris & Hoffman, LLP, Venice, California; and Penelope Glass, Law Offices of Penelope Glass, Los Angeles, California, for the plaintiff-appellant.

Christopher M. Patti, Office of the General Counsel, The Regents of the University of California, Oakland, California, for the defendants-appellees.

Kevin M. Brennan, Arnold & Porter, New York, New York, for the amicus curiae.

ORDER

The mandate is recalled for the limited purpose of correcting the caption. The Opinion filed on August 12, 2002, is amended as follows:

On slip opinion page 11773, in the caption after "CHARLES LI, in his" insert "individual and" so it reads, "CHARLES LI, in his individual and official capacity as Dean."

On slip opinion page 11773, in the caption after "GALEN STUCKY," change "Material" to "Materials."

On slip opinion page 11773, in the caption after "SARAH PRITCHARD," delete "in her individual and" so it reads, "SARAH PRITCHARD, in her official capacity as Director."

The mandate shall reissue forthwith.

OPINION

GRABER, Circuit Judge:

In this appeal, we consider the extent to which the First Amendment and due process guarantees are implicated when a graduate student's thesis committee declines to approve a thesis that meets academic and professional standards in all respects except one: The acknowledgments section does not conform to established academic and professional standards. We conclude that the Amendment does not require university professors to assign a passing grade to such a thesis. We further hold that the university's review procedures satisfied due process. Accordingly, we affirm the district court's grant of summary judgment in favor of Defendants, who are university professors and officials. However, we remand the case for the district court to address a state constitutional claim that it did not resolve.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Christopher Brown was a master's degree candidate in the Department of Material Sciences at the University of California at Santa Barbara ("UCSB"), a public university. In order to earn a master's degree, Plaintiff was required to write a thesis under the guidance and subject to the approval of his thesis committee: Defendants Dr. Galen Stucky (Plaintiff's thesis advisor), Dr. Daniel Morse, and Dr. Fred Lange.

Rules governing the content and structure of master's theses, and the procedures for submitting those theses for approval, are contained in UCSB's Graduate Student's Handbook 1998-99 (Sept. 1998) ("Handbook") and in the UCSB Guide to Filing Theses and Dissertations (Feb. 1998)

("Guide"). The Guide notes that one of the pedagogical purposes of the thesis project is to educate students about how to communicate research results in their chosen disciplines: "The essence of academic research is shared results. Each discipline has a relatively standard method of presenting research results so that other researchers can find and build on past work." Guide at 1. With respect to the content of a thesis or dissertation, the Guide states:

> You *and your committee* are responsible for everything between the margins. The organization, presentation, and documentation of your research should meet the standards for publishing journal articles or monographs in your field. For general information, consult any standard style guide (such as Strunk and White, Turabian, or *The University of Chicago Manual of Style*). For discipline-specific questions, consult your faculty committee and/or a style sheet from a journal in your discipline.

Id. (emphasis added).

The Guide also provides the general criteria for an optional "Dedication and/or Acknowledgments" section of a student thesis: "You may wish to dedicate this work to someone special to you or to acknowledge particular persons who helped you. Within the usual margin restrictions, any format is acceptable for these pages."

One of the style manuals to which the Guide refers further clarifies the criteria for acknowledgments sections contained in scholarly papers. *See* Kate L. Turabian, A Manual for Writers of Term Papers, Theses, and Dissertations §§ 1.9, 1.26 (Univ. of Chi. Press, 6th ed. 1996). With respect to acknowledgments, it states:

> In the acknowledgments, the writer thanks mentors and colleagues, lists the individuals or institutions

> that supported the research, and gives credit to works cited in the text for which permission to reproduce has been granted. Although one might wish to acknowledge special assistance such as consultation on technical matters or aid in securing special equipment and source materials, one may properly omit formal thanks for the routine help given by an adviser or thesis committee. The generic heading ACKNOWLEDGMENTS, which appears only on the first page, is in uppercase and centered over the text.

Id. § 1.26.[1]

The Handbook elaborates further on the supervisory role of the thesis committee with respect to the content of a master's thesis:

> Students, in conjunction with the faculty who supervise the writing of the dissertation, are responsible for the quality of scholarship in theses and dissertations, including presentation in a format that conforms to disciplinary standards. *Faculty should not approve a dissertation that fails to address disciplinary and/or departmental standards.*

Handbook at 12 (emphasis added).

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[1]The standard for acknowledgments articulated by Turabian is consistent with the standards articulated by other style manuals. *See, e.g.*, Scientific Style and Format 588 (Council of Biology eds., 6th ed. 1994) ("An acknowledgment section can carry notices of permission to cite unpublished work, identification of grants and other kinds of financial support, and credits for contributions to the reported work that did not justify authorship."); The New York Public Library Writer's Guide to Style and Usage 547 (Stonesong Press 1994) ("*Acknowledgments*. Here the author lists and thanks contributors, often including the editor, the designer, and any colleagues or experts who reviewed the manuscript.").

In the spring of 1999, Plaintiff brought his thesis, "The Morphology of Calcium Carbonate: Factors Affecting Crystal Shape," to his committee for final approval. Plaintiff did not include an acknowledgments section of any kind in the document that he delivered to his committee. All three committee members signed an approval page stating, "*This* Thesis of Christopher Brown is approved." (Emphasis added.) In accordance with UCSB rules, that approval page became the second page of the thesis.

After he had obtained the signature page from his committee, Plaintiff inserted an additional, two-page section into his thesis without the knowledge or consent of his committee members. That section, entitled "Disacknowledgements," began: "I would like to offer special *Fuck You*'s to the following degenerates for of being an ever-present hindrance during my graduate career . . . ." It then identified the Dean and staff of the UCSB graduate school, the managers of Davidson Library, former California Governor Wilson, the Regents of the University of California, and "Science" as having been particularly obstructive to Plaintiff's progress toward his graduate degree. Plaintiff later explained that he had not revealed the section to the members of his committee because he feared that they would not approve it.

UCSB rules require that graduate students file their approved theses or dissertations in the university's library as a prerequisite to earning a degree. In June of 1999, Plaintiff attempted to file his thesis, including the unapproved "Disacknowledgements" section, with the library. Defendant Charles Li, the Dean of the Graduate Division of UCSB, was alerted to the presence of the "Disacknowledgements." Dean Li, in turn, referred the issue to Plaintiff's thesis committee.

During June and July, Plaintiff met with members of his committee and with Dean Li to discuss the "Disacknowledgements." He also met with the UCSB Ombudsperson and with the Dean of the UCSB School of Engineering. Plaintiff

drafted an alternative version of the section, eliminating the profanity.

The committee members agreed that the "Disacknowledgements" section (even in its nonprofane form) did not meet professional standards for publication in the field. They notified Plaintiff of their decision in a memorandum dated August 5, 1999. That memorandum, written by Dr. Stucky, read in part:

> 1) The Dissertation Committee stands by its approval of the thesis (dissertation) as it was presented by you to the Committee for their evaluation, review and approval; and, subsequently signed by the members of the Dissertation Committee.
>
> 2) The disacknowledgement was not submitted to the Dissertation Committee or to the Graduate Division of the University of California, but for deposition in the Library without knowledge of either the Dissertation Committee or the Graduate Division. It is the understanding of the Dissertation Committee members who reviewed your thesis that the signatures of the Dissertation Committee members are a guarantee that the presentation and content of the entire thesis meets the standards and requirements of the Department, College, and the University of California to whom the thesis is submitted for the appropriate advanced degree. The addition or removal of material from a dissertation after the examination, evaluation and signed approval of the original materials that are presented by the candidate to the Committee; and, the subsequent presentation to the scientific community and to the University of such a modified dissertation under the approval signatures of the Committee

> given only for the original Dissertation presentation to the Committee without the consent of the Committee for the addition or removal of material, is unacceptable to the Committee.

In the August 5 memorandum, the committee also commented that it had consulted with counsel and determined that a thesis or other scientific manuscript is not a "public forum." The committee further said that it would not approve the addition of the "added material[s]" to the original, approved thesis, nor would it approve a thesis that contained them.

On the same date, Dean Li wrote a letter to Plaintiff, informing him that his degree would be conferred upon the approval of his thesis. The letter further noted that approval would be forthcoming as soon as Plaintiff removed his "Disacknowledgements." It outlined Plaintiff's avenues of appeal, should he opt to challenge the committee's decision not to approve the new version of the thesis.

Plaintiff declined to remove the "Disacknowledgements." Instead, he submitted a written appeal to the Academic Affairs Committee (AAC) of the Department of Material Sciences. The AAC considered Plaintiff's appeal and unanimously rejected it in a written decision. The AAC reasoned that the entire paper, not merely the technical content of the thesis, was subject to the review and approval of the thesis committee—just as the entirety of a scientific paper would be subject to the review and approval of the editorial board of any publication to which it was submitted. The AAC articulated the standard for an acknowledgment section:

> An Acknowledgment section in a scientific paper is relevant only as a vehicle for the author to give proper credit to people or organizations that have contributed to make possible the technical work being reported. In the case of a thesis this could include faculty, post-docs, fellow students, and labo-

> ratory staff who have helped the student with ideas, setting up experiments, clarifying difficult questions, etc. A student is also expected to thank the agency that has provided funding for his/her assistantship and research expenditures. Under the same premise, the student is given a certain latitude in a thesis to thank his/her parents, spouse, family or close friends who have provided moral or financial support through his/her education. The student is encouraged to have an Acknowledgment section as part of teaching him/her proper professional conduct.

The AAC determined that Plaintiff's "Disacknowledgements" did not meet that standard. It concluded that the section was otherwise irrelevant to the content of his thesis. The AAC reminded Plaintiff that several other avenues were open to him for disseminating the opinions contained in the "Disacknowledgements" and observed that it was common in the field for "technical material removed from a paper on the ground of irrelevancy to be published separately." The decision additionally noted the rights of the committee members not to be associated, through their approval, with the content of the "Disacknowledgements" section. Finally, the AAC commented that Plaintiff's conduct was unprofessional in later inserting the material into his thesis without the knowledge or approval of his thesis committee.

Plaintiff appealed the AAC's decision to the Associate Dean of the Graduate Division, Diane Mackie. After reviewing the file, Dean Mackie denied the appeal.

Next, Plaintiff appealed to the UCSB Graduate Council, to which he submitted extensive written material. The Graduate Council rejected Plaintiff's appeal in a written decision. It reasoned that, under the university's regulations, the entirety of Plaintiff's thesis was subject to the approval of his thesis committee, and the "committee members [were] within their rights to withdraw their approval, as they do not approve of

your added section." The Graduate Council additionally found that Plaintiff had been denied a degree only because he had not completed one of the prerequisites to completing a master's degree: filing a thesis approved by the committee. The Graduate Council suggested two ways in which Plaintiff could complete his degree:

> 1) seek approval of your entire thesis from your current committee, including the content of any acknowledgements/dedication section. All sections of your thesis are subject to their editing and approval.
>
> or.
>
> 2) seek to change the membership of the committee, subject to the approval of your department and the Graduate Division and appropriate university regulations. Submit your complete thesis with the new committee and meet all editing or research requirements imposed by that committee.

Plaintiff chose not to pursue either option proposed by the Graduate Council. Instead, he filed a grievance with the Academic Freedom Committee (AFC). He presented his case orally to the Chair of the AFC and in writing to the full AFC. The AFC rejected his grievance. It reasoned that the rules for filing theses did not impermissibly restrict academic freedom and that Plaintiff had failed to follow those rules.

By January 2000, Plaintiff had exceeded the time limit for completing his master's degree and was, therefore, placed on academic probation in accordance with pre-existing UCSB policy. Dean Li notified Plaintiff that if he failed to complete his degree by the end of the Spring Quarter of 2000, then the Department of Material Sciences would be asked to recommend either academic disqualification or continued academic probation. On April 18, 2000, near the end of Spring Quarter,

Dean Li sent a memorandum to the Department, asking for its recommendation as to Plaintiff's academic status. On May 16, 2000, the Department recommended that Plaintiff receive his degree, based on the draft of the thesis that had received approval, despite Plaintiff's failure to comply with the requirements for earning his degree. UCSB followed the recommendation and awarded Plaintiff his degree. However, because Plaintiff has not filed the *approved* version of his thesis with the UCSB library, the thesis has not been added to the library's archive of theses.

Plaintiff initiated this § 1983 action on June 16, 2000. His complaint alleged three claims: (1) that Defendants (the Dean of the UCSB Graduate Division, the Chancellor of UCSB, the members of Plaintiff's thesis committee, and the Director of the UCSB library) violated his First Amendment rights by "withholding" his degree and by their "conduct"; (2) that Defendants violated his right to procedural due process by withholding his degree without having provided him a formal hearing; and (3) that Defendants' refusal to grant his degree unless he removed the "Disacknowledgements" violated article I, section 2, of the California Constitution. Plaintiff sought damages, declaratory relief, and an injunction to compel Defendants to place Plaintiff's thesis, including the "Disacknowledgements," in the UCSB library.

Defendants moved for summary judgment on the federal claims. They argued that they were entitled to qualified immunity on the damages claims and that Plaintiff was not entitled to injunctive relief. The court permitted Plaintiff to conduct limited discovery.

After discovery, Plaintiff filed a memorandum in opposition to summary judgment. He attached, as an exhibit to the memorandum, several other students' acknowledgments sections approved by UCSB faculty, including three approved by Defendant Stucky. None were approved by any other members of Plaintiff's thesis committee. All of those acknowledg-

ments sections conveyed thanks to various people and institutions, sometimes in profuse, humorous, or poetic form. In addition to thanking teachers, colleagues, family, friends, staff, employers, the university, and sources of grants or other support, some students thanked God for providing guidance or thanked their pets. The three sections approved by Dr. Stucky included (1) a three-page section describing how the student came to arrive at graduate school; thanking his grandfather, professors, staff, co-researchers, and "[o]ther chemists in the Stucky group that have given valuable input"; and endorsing certain products; plus a half-page of "negative statement[s]" related to the inferior state of the chemists' facilities and to a flood that ruined some of the student's files; plus a dedication page honoring "my family and friends who have died since I began my college career" and with whom the student "would have liked . . . to share this moment"; (2) a five-page section thanking many professors, scientists, friends, supervisors, colleagues, graduate students, a summer assistant, collaborators, "influential people in the zeolite field," the staff of the Materials Research Laboratory, family, and friends; plus a dedication page honoring the student's wife for "her support, encouragement, and love" and his daughter for her "smiles and hugs"; (3) a one-page section thanking the student's professors and colleagues, his parents, and a friend; plus a dedication page honoring his wife "for all of her love and understanding."

After holding a hearing, the court granted summary judgment in favor of Defendants. Plaintiff timely appealed.

STANDARD OF REVIEW

We review de novo a grant of summary judgment. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). Viewing the evidence in the light most favorable to the nonmoving party, we must decide whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *Id.*

DISCUSSION

A. *Qualified Immunity on the First Amendment Claim*

[1] We apply a three-step test to determine whether a defendant is entitled to qualified immunity on a federal constitutional claim. First, we must determine whether the facts alleged, viewed in the light most favorable to the plaintiff, demonstrate that the defendant's conduct violated a constitutional right. *Robinson v. Solano County*, 278 F.3d 1007, 1012-13 (9th Cir. 2002) (en banc) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Next, if the facts alleged show a constitutional violation, we must decide whether the constitutional right at stake was clearly established at the time of the alleged violation. *Id.* Finally, if the right was clearly established, we assess whether an objectively reasonable government actor would have known that his or her conduct violated the plaintiff's constitutional right. *Id.*

Plaintiff primarily contends that the facts, viewed in his favor, demonstrate a violation of his clearly established First Amendment rights. He challenges three acts: (1) the thesis committee's decision not to approve his "Disacknowledgements"; (2) the library's decision not to file his thesis in its archives; and (3) the UCSB's initial decision not to confer his degree.

Plaintiff cannot state separate First Amendment claims with respect to the second and third decisions. Under UCSB's policy, each of those two decisions was nondiscretionary, that is, turned completely on the committee's decision whether to approve the thesis. Had the committee approved the "Disacknowledgements" section, the library would have had to file the thesis containing it. The library had no independent authority to decide whether or not to include the thesis in its collection. Likewise, had Plaintiff filed an approved thesis

with the library, UCSB would not have had discretion to decide to withhold or defer the degree.[2]

[2] Because the decisions not to place the thesis in the library and to delay granting Plaintiff's degree were not independent decisions but, rather, were direct consequences of the committee's decision not to approve the "Disacknowledgements," the real question is whether Defendants violated Plaintiff's First Amendment rights when they refused to approve that section. We have found no precedent precisely on point. However, a review of the cases discussing the relationship between students' free speech rights and schools' power to regulate the content of curriculum demonstrates that educators can, consistent with the First Amendment, restrict student speech provided that the limitation is reasonably related to a legitimate pedagogical purpose.

[3] In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 276 (1988), the Supreme Court of the United States held that school officials did not violate students' First Amendment rights when they prohibited the publication in the school newspaper of stories that the officials found objectionable. The Court concluded that the newspaper, which was produced by a high school journalism class, was "fairly . . . characterized as part of the school curriculum" because it was "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271. Because of its curricular nature, the newspaper did not qualify as a public forum. *Id.* at 272. The Court then held that,

[2]Contrary to the dissent's suggestion, UCSB's ultimate decision to award Plaintiff a master's degree despite his failure to meet all the required conditions for obtaining it (e.g., filing the thesis in the library) does not make those conditions nonmandatory and does not create a material issue of fact. Dissent at 52. Rather, this outcome suggests only that UCSB decided to violate its mandatory policy in the hope of avoiding litigation and bad publicity. There is no issue of fact as to the content of the policy and no evidence that UCSB ever has deviated from the policy before or since, except to *benefit* Plaintiff in this one instance.

with respect to students' curricular speech, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Both the majority and the dissent in *Hazelwood* agreed that "the First Amendment permits educators 'to assure that participants learn whatever lessons the activity is designed to teach' " and that

> the First Amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," or that falls short of the "high standards for . . . student speech that is disseminated under [the school's] auspices . . . ." . . . The educator may . . . constitutionally "censor" poor grammar, writing, or research because to reward such expression would "materially disrup[t]" the newspaper's curricular purpose.

Id. at 283-84 (Brennan, J., dissenting) (quoting *id.* at 271-72 & n.4) (alteration in original); *see also Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91 n.6 (1978) (noting that a medical student properly may be judged on questions of personal hygiene and timeliness, as well as on questions of academic and clinical competence).

Settle v. Dickson County School Board, 53 F.3d 152 (6th Cir. 1995), more strongly resembles the present case. There, the plaintiff argued that her ninth-grade teacher violated her First Amendment rights when she refused to approve the plaintiff's chosen topic for a class research paper and gave the plaintiff a grade of zero on the assignment when the plaintiff refused to comply with requirements related to the assignment. *Id.* at 155. The student had submitted only one topic for the teacher's approval, which the student duly received. Then the student—without the knowledge or approval of the

teacher—changed her topic. *Id.* at 154. Relying on *Hazelwood*'s recognition of a school's power to regulate classroom speech, the court rejected the plaintiff's First Amendment argument, holding:

> The free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question. So long as the teacher violates no positive law or school policy, the teacher has broad authority to base her grades for students on her view of the merits of the students' work. Grades are given as incentives for study, and they are the currency by which school work is measured.
>
> . . . So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.
>
> Like judges, teachers should not punish or reward people on the basis of inadmissible factors—race, religion, gender, political ideology—but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech. Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions—in a word to encourage speech germane to the topic at hand

> and discourage speech unlikely to shed light on the subject.

Id. at 155-56 (citations omitted). One judge concurred in the judgment, but concluded that the First Amendment was not implicated at all by the facts presented:

> The bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than that assignment and receive credit for it. It is not necessary to try to cram this situation into the framework of constitutional precedent, because there is no constitutional question.

Id. at 158 (Batchelder, J., concurring in the judgment).

[4] *Hazelwood* and *Settle* lead to the conclusion that an educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment. Those cases also make clear that the First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in his or her judgment, fails to meet a legitimate academic standard. Rather, as articulated by *Hazelwood*, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273.

Plaintiff argues that the *Hazelwood* standard does not apply in the context of a university-level assignment, as distinct from a primary-school or secondary-school environment. It is true that the Court left open the question "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Id.* at 273 n.7. It also is true that courts addressing the

extent to which a public college or university, consistent with the First Amendment, can regulate student speech in the context of *extracurricular* activities, such as yearbooks and newspapers, have held that *Hazelwood* deference does not apply. *See, e.g.*, *Kincaid v. Gibson*, 236 F.3d 342, 346 & nn.4 & 5 (6th Cir. 2001) (en banc) (holding that the *Hazelwood* standard did not apply in a challenge to Kentucky State University's regulation of the student yearbook); *Student Gov't Ass'n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (concluding that *Hazelwood* "is not applicable to college newspapers"); *see also Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 863 n.4 (9th Cir. 1982) (in a case holding that a high school could require prepublication review of newspaper articles without violating students' First Amendment rights, stating that "[d]ifferent considerations govern application of the first amendment on the college campus and at lower level educational institutions" and that "activities of high school students" may be reviewed more stringently than those of college students because "the former are in a much more adolescent and immature stage of life and less able to screen fact from propaganda" (citations and internal quotation marks omitted)).

However, the parties have not identified, nor have we found, any Supreme Court case discussing the appropriate standard for reviewing a university's regulation of students' *curricular* speech. It is thus an open question whether *Hazelwood* articulates the standard for reviewing a university's assessment of a student's academic work. We conclude that it does.

[5] The Supreme Court has suggested that core *curricular* speech—that which is an integral part of the classroom-teaching function of an educational institution—differs from students' *extracurricular* speech and that a public educational institution retains discretion to prescribe its curriculum. For example, in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), the Supreme Court held that a

debate sponsored by a state-owned public television station was a nonpublic forum from which the broadcaster could exclude an independent candidate in the exercise of journalistic discretion. In reaching that conclusion, the Court said:

> As a general rule, the nature of editorial discretion counsels against subjecting broadcasters to claims of viewpoint discrimination. Programming decisions would be particularly vulnerable to claims of this type because even principled exclusions rooted in sound journalistic judgment can often be characterized as viewpoint based. . . . Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or *a public school prescribing its curriculum*, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. Were the judiciary to require, and so to define and approve, preestablished criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.

Id. at 673-74 (emphasis added). The Court thus referred to the principle that a public school has discretion to engage in its own expressive activity of prescribing its curriculum.

An earlier Supreme Court case also distinguished between curricular and extracurricular activities in the First Amendment context. In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 872 (1982), the Court held that a local school board could not remove books from the school library solely because the members of the board disliked the ideas contained therein. The plurality opinion of the Court was careful, however, to clarify that its ruling did not apply to curricular speech. The plaintiffs did not seek

> to impose limitations upon their school Board's discretion to prescribe the curricula of the Island Trees

> schools. On the contrary, the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading. Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there.

Id. at 862; *see also id.* at 869 (stating that the school board was attempting improperly "to extend [its] claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway"); *Horowitz*, 435 U.S. at 90 (observing that "the decision of an individual professor as to the proper grade for a student in his course" is a determination that "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial . . . decisionmaking"); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 122 S. Ct. 2559 (2002) (distinguishing between core educational functions and voluntary extracurricular activities for Fourth Amendment purposes and holding that a school district constitutionally may require all students to submit to drug testing as a prerequisite to participating in all competitive extracurricular activities).

[6] In summary, under the Supreme Court's precedents, the curriculum of a public educational institution is one means by which the institution itself expresses its policy, a policy with which others do not have a constitutional right to interfere. *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1015-16 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001). The Supreme Court's jurisprudence does not hold that an institution's interest in mandating its curriculum and in limiting a student's speech to that which is germane to a particular *academic* assignment diminishes as students age. Indeed, arguably the need for academic discipline and editorial rigor increases as a student's learning progresses.

[7] To the extent that the Supreme Court has addressed the difference between a university's regulation of curricular

speech and a primary or secondary school's regulation of curricular speech, it has implied that a university's control may be broader. It has done so in its cases recognizing the doctrine of university professors' academic freedom, a doctrine that encompasses "the idea that universities and schools should have the freedom to make decisions about how and what to teach." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000) (Souter, J., concurring in the judgment). In *Southworth*, Justice Souter summarized the current state of "academic freedom" law:

> In *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 88 L. Ed. 2d 523 (1985), we recognized these related conceptions: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." Some of the opinions in our books emphasize broad conceptions of academic freedom that if accepted by the Court might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission. So, in *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d. 1311 (1957), Justice Frankfurter, concurring in the result . . . , explained the importance of a university's ability to define its own mission by quoting from a statement on the open universities in South Africa:
>
> > " 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may

> be taught, how it shall be taught, and who may be admitted to study.' "
>
> . . . While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching . . . , we have never held that universities lie entirely beyond the reach of students' First Amendment rights.

Id. at 237-39 (citations omitted).

We do not know with certainty that the Supreme Court would hold that *Hazelwood* controls the inquiry into whether a university's requirements for and evaluation of a student's curricular speech infringe that student's First Amendment rights. Nevertheless, of all the Supreme Court's cases, *Hazelwood* appears to be the most analogous to the present case.

In view of a university's strong interest in setting the content of its curriculum and teaching that content, *Hazelwood* provides a workable standard for evaluating a university student's First Amendment claim stemming from curricular speech. That standard balances a university's interest in academic freedom and a student's First Amendment rights. It does not immunize the university altogether from First Amendment challenges but, at the same time, appropriately defers to the university's expertise in defining academic standards and teaching students to meet them.

[8] Applying the *Hazelwood* standard to the facts of this case, and viewing those facts in favor of Plaintiff, we conclude that Plaintiff cannot show a violation of his First Amendment rights. In this case, as in *Settle*, Plaintiff was given an assignment: the writing of a master's thesis. That assignment, like the paper in *Hazelwood*, is "fairly . . . characterized as part of the . . . curriculum," 484 U.S. at 271,

because it was designed to teach Plaintiff how to research within an academic specialty and how to present his results to other scholars in his field. Therefore, like the newspaper in *Hazelwood*, Plaintiff's thesis was subject to a reviewing committee's reasonable regulation. Plaintiff was given reasonable standards for that assignment, including a pedagogically appropriate requirement that the thesis comply with professional standards governing his discipline. He was instructed that he should consult a standard style manual, or talk with members of his committee, about those requirements. Like the plaintiff in *Settle*, Plaintiff bypassed the approval process and prepared an assignment that did not comply with the stated criteria. Under *Hazelwood* and *Settle*, Plaintiff's committee members acted well within their discretion, and in conformity with the First Amendment, when they declined to approve the noncompliant section. Their decision was reasonably related to a legitimate pedagogical objective: teaching Plaintiff the proper format for a scientific paper.

Moreover, the committee members had an affirmative First Amendment right not to approve Plaintiff's thesis. *See Parate v. Isibor*, 868 F.2d 821, 828-30 (6th Cir. 1989) (holding that a university professor has a First Amendment right to assign grades and evaluate students as determined by his or her independent professional judgment). That is especially true where, as here, the committee members' names appear in the thesis and where, according to the Guide, they are jointly responsible for its content. The presence of Defendants' affirmative right underscores Plaintiff's lack of a First Amendment right to have his nonconforming thesis approved.

Plaintiff counters, first, that the Guide does not require acknowledgments sections to meet academic and professional standards but, instead, grants students wide discretion to write whatever they want. According to Plaintiff, the use of the word "may" in the part of the Guide defining the "Dedication and/or Acknowledgments" section[3] of a thesis means that a

[3]The section provides: "You *may* wish to dedicate this work to someone special to you or to acknowledge particular persons who helped you.

student has complete discretion with respect to the *content* of that section—the student "may" dedicate the thesis to someone special or give thanks to helpful individuals in the section, or the student "may" use the section to communicate some other message. That is not a permissible reading of the Guide. An acknowledgments section has a well-defined form and purpose in academic writing. Moreover, the context is the statement in the Guide that the inclusion of such a section is "optional." Thus, the word "may" simply refers to the fact that a student "may" either include an appropriately drafted section thanking people or "may" omit the section altogether. That is, the discretion to which the term "may" refers is the discretion whether to include the section or not.[4]

Plaintiff also contends that the fact that the Guide permits the section to be in any "format" means that a student has freedom to choose the content of the acknowledgments section. We are not persuaded. "Format" commonly refers to the physical layout of a document, not its substantive content. *See, e.g.*, The American Heritage Dictionary 535 (3d ed. 2000). Nothing in the Guide suggests that "format" has a nonstandard meaning here.

In the alternative, whatever the meaning of the Guide, Plaintiff argues that he has a First Amendment right to draft an acknowledgments section from *any* viewpoint. To the con-

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Within the usual margin restrictions, any format is acceptable for these pages." (Emphasis added.)

[4]As a corollary, Plaintiff suggests that there can be no legitimate pedagogical purpose served by imposing academic standards on a section that is optional. For students who choose not to include an acknowledgments section at all, he points out, no learning will take place. That may be true, but it does not follow that there is no legitimate pedagogical purpose served by imposing criteria on those who do include such a section. Footnotes, like this one, are optional, but in each academic discipline there is a proper way to use footnotes; university professors may demand conformity with that standard when a student includes footnotes.

trary, *Hazelwood* and *Settle* establish that—consistent with the First Amendment—a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose. For example, a college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write "opinions" showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question. In this case, the thesis committee was entitled to require that the acknowledgments section (if it were included) recognize those who made a positive contribution to Plaintiff's education. Such requirements are part of the teachers' curricular mission to encourage critical thinking (in the hypothetical examples) and to conform to professional norms (in this case).

Finally, Plaintiff argues, even if the Guide requires that an acknowledgments section meet academic and professional standards, there is a genuine issue of material fact as to whether UCSB enforced the standards in his case for nonpedagogical reasons. He argues that some other students were not required to conform to those standards, suggesting that there actually were no standards.

A few prior acknowledgments sections that arguably were "nonconforming" create no issue of material fact, for two reasons. First, and most importantly, this thesis committee was entitled to set an academic standard for Plaintiff's thesis, including its acknowledgments section, even if no thesis committee in the past ever had set one. Second, this thesis committee was entitled to adhere to written academic standards even if some other thesis committees (none of which was identical in composition to Plaintiff's committee) had been lax. The evidence on which Plaintiff relies is irrelevant; it simply has no bearing on whether *his* thesis committee had a legitimate pedagogical purpose. Instead, it simply shows, at best, that some professors are less rigorous in enforcing academic standards than others. While it would be preferable, as

a matter of academic policy, for individual professors to strive for uniformity when evaluating students' work, inconsistency among individual professors in applying academic standards to students' work does not vest students with a constitutional right to passing grades on papers that would meet the approval of the easiest-grading professor. There is no First Amendment right to consistency.

Moreover, the summary judgment record does not support an inference that UCSB acted because of the content of Plaintiff's ideas, rather than the format and placement of those ideas. An academic thesis co-signed by a committee of professors is not a public forum, limited or otherwise.[5] As Defendants explained to him, Plaintiff remained free to publish and publicize his ideas in many other ways.

[9] In short, the decision of Plaintiff's committee members not to approve the "Disacknowledgements" section did not violate Plaintiff's First Amendment rights. Because UCSB's decision not to place the thesis in the library and to defer granting Plaintiff's degree cannot be viewed as independent of the approval decision, those actions likewise did not violate Plaintiff's First Amendment rights. Therefore, the district court properly concluded that (a) Defendants are entitled to qualified immunity on Plaintiff's First Amendment claim and (b) Plaintiff cannot compel the library to file the unapproved thesis in the archives.

B. *Qualified Immunity on the Procedural Due Process Claim*

Plaintiff also argues that Defendants violated his clearly established right to due process when they "withheld [Plain-

[5]The dissent posits that a "public forum" analysis might provide an appropriate standard for this case. Dissent at 47-48. However, the dissent does not identify what, precisely, could constitute a public forum in this case.

tiff's] degree and otherwise harmed [him] without ever giving him a fair hearing."

Although Plaintiff labels Defendants' conduct punitive or disciplinary, the entire record belies that characterization. The undisputed facts show that Plaintiff was not punished on account of his "Disacknowledgements." To the contrary, Defendants at all times confirmed their approval of his thesis as it had been submitted to them, and even pointed helpfully to ways in which Plaintiff could express the criticisms embodied in the "Disacknowledgements." Defendants' only act was a simple refusal to approve the section because it did not meet academic and professional standards. As a result, Plaintiff did not receive his degree earlier because he had not met the requirements to receive it. In view of those facts, the decision not to approve Plaintiff's thesis is properly characterized as an "academic" decision, rather than as a "disciplinary" decision.

Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978), establishes the standard for procedural due process in the context of academic decisions. In that case, the plaintiff argued that the university had violated her right to procedural due process when it dismissed her for academic reasons without first giving her a hearing. *Id.* at 79-80. The Court, without deciding whether the plaintiff had a protected liberty or property interest in continuing her education, rejected her argument. The Court held that, when dismissing a student for academic reasons, a university need not hold a hearing. *Id.* at 85, 89-91. A university meets the requirements of procedural due process so long as the dismissal decision is "careful and deliberate." *Id.* at 85.

Here, the initial decision not to confer Plaintiff's degree for academic reasons was analogous, although not identical, to the academic-dismissal decision in *Horowitz*. Applying analogous principles, procedural due process did not require Defendants to hold a formal hearing before they decided to defer

conferral of Plaintiff's degree until he met academic requirements. Instead, it was sufficient for Defendants to make a "careful and deliberate" decision. The record—particularly the written decisions resolving Plaintiff's various appeals—shows that they did. Consequently, the facts, even when viewed in favor of Plaintiff, do not establish a violation of procedural due process. The district court properly held that Defendants were entitled to qualified immunity on Plaintiff's procedural due process claim.

C. *Plaintiff's State-Law Claim*

The district court's decision granting summary judgment focuses entirely on Plaintiff's federal constitutional claims and is silent with respect to his claim under the California Constitution. The order does not state whether the court considered the state claim to be resolved or whether the court was dismissing the claim under *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966) (discussing when a federal court should retain pendent jurisdiction over state-law claims if federal claims are dismissed before trial). The reason for granting summary judgment was that Defendants were entitled to qualified immunity. Qualified immunity does not necessarily provide a ground for dismissing the California constitutional claim, even if the freedom of speech protected by the California Constitution is coextensive with the First Amendment. Consequently, we remand the case to the district court with directions either to address the state-law claim on the merits or to dismiss it.

CONCLUSION

We hold that Plaintiff does not have a First Amendment right to have his nonconforming thesis approved, nor did he have a right to a formal hearing with respect to his committee's academic decision not to approve the thesis. As a result, Defendants are entitled to qualified immunity on Plaintiff's damages claims, and Plaintiff cannot compel Defendants to

place the unapproved version of his thesis in the UCSB library.

Because the district court did not address Plaintiff's claim under the California Constitution, we remand the case to the district court to resolve it on the merits or dismiss it.

AFFIRMED with respect to the federal claims; REMANDED with respect to the California constitutional claim. The parties shall bear their own costs on appeal.

FERGUSON, Circuit Judge, concurring in the affirmance of the District Court and the remand on state issues:

I agree that the plaintiff's First Amendment rights were not violated and express a reasoning different from both of my associates.

This case is about an erosion of academic integrity. To put it in the vernacular, the guy cooked the books (his master's thesis), got caught, and now wants to shield his misbehavior under the umbrella of the First Amendment.

The plaintiff, in order to earn his master's degree, presented his thesis to his faculty committee for its approval. The thesis did not include the optional acknowledgment section. The committee approved the thesis as presented to them. The university requires that graduate students must file their approved thesis in the university library as an additional requirement for earning their master's degree.

Instead of submitting the approved copy of his thesis to the university library, the plaintiff, unknown to his thesis committee, added two pages of "Disacknowledgments," containing vulgar language naming the persons he believed to be the "de-

generates" who posed "an ever-present burden during my graduate career . . . ."

The librarian refused to file the altered thesis because it had not been approved by the faculty committee. University regulations provide that the faculty members who comprise the thesis committee are jointly responsible with the candidate for the content of the thesis. By adding the "Disacknowledgments" section to his thesis for submission to the university library, the plaintiff tried to circumvent the university's requirement of faculty approval and misrepresented to both the university and his academic field that his "Disacknowledgments" had been accepted by the faculty committee for publication.

The faculty committee was not required to approve the plaintiff's thesis with his post-approval modifications. The committee emphasized that its refusal to publish the thesis with the "Disacknowledgments" section was based on its conclusion that the plaintiff's addition of the material "after the examination, evaluation and signed approval of the original materials . . . is unacceptable to the Committee." Thus, it was the academically dishonest manner in which the plaintiff tried to publish his "Disacknowledgments," rather than his views, that the committee disapproved.

The First Amendment does not protect nor authorize deception. *Va. State Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.") (citing *Gertz v. Welch, Inc.*, 418 U.S. 323, 340 (1974)). Just as the university could punish the plaintiff for plagiarism or cheating, so could it refuse to approve his dishonest addition of the "Disacknowledgments." *See Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 624 (5th Cir. 1975) (finding no First Amendment problem with a student code of conduct that authorized expulsion of a graduate student for using his professor's name, without his knowledge, as a coau-

thor in an article he submitted for publication). The plaintiff cannot cheat and then seek to evade accountability through the First Amendment.

Accordingly, the plaintiff's First Amendment claim fails.

REINHARDT, Circuit Judge, concurring in part and dissenting in part:

Although the underlying dispute may appear to some to be trivial, and perhaps not worthy of serious First Amendment deliberation, the extreme positions taken by the parties during the course of their disagreement and the erroneous legal rule advocated by one of my colleagues leaves me with little choice but to discuss the constitutional questions in some depth. I agree that we should affirm the district court's grant of summary judgment with respect to Brown's procedural due process claim and that we should remand the state law claims for further consideration. I respectfully dissent, however, from my colleagues' decision to affirm the award of summary judgment to the university with respect to Brown's First Amendment claims.

First, I emphasize that there is no agreement between my colleagues in the majority as to the legal standard applicable to Brown's First Amendment claims. Thus, there is no majority opinion and no binding precedent with respect to any First Amendment principles. Although Judges Graber and Ferguson reach the same conclusion, they do so for wholly different reasons. Judge Graber would apply the First Amendment standard that the Supreme Court created for high school student speech in *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260 (1988), to the speech of college and graduate students and would affirm the district court's grant of summary judgment to the university defendants on the ground that under that standard it may regulate the content of the "Disacknowledg-

ments" that Brown inserted in his thesis. Judge Ferguson would also affirm the district court's decision, but would do so because he believes that this case is about punishing a student who was caught "cheating," an action that he does not believe triggers First Amendment review. He believes that it is the insertion of unauthorized material in Brown's thesis — an act of cheating or deception — that caused the university to discipline him. Because he does not believe that the First Amendment protects cheating — and on that legal question I agree with him — Judge Ferguson does not address the First Amendment standard that is applicable to the regulation of college and graduate student speech.

I disagree with both of my colleagues' positions. I disagree with Judge Graber because she would have this court adopt an erroneous First Amendment standard for a university's attempts to regulate the speech of college and graduate students, and also because, even if that standard were applicable, the issues regarding the University's excessive response to Brown's disacknowledgments are not appropriate for decision without a trial on the facts. I disagree with Judge Ferguson because the record does not in any way support his conclusion as to the reason Brown was disciplined. Moreover, at the very least, the university's motivation for disciplining Brown is a question of fact that cannot be resolved on summary judgment.

Judge Graber would have us adopt a First Amendment standard regarding the authority of public universities to limit the speech of graduate students that I believe to be wholly inappropriate — a standard that would seriously undermine the rights of all college and graduate students attending state institutions of higher learning. Specifically, she would import into the college and graduate academic world the limitations on speech that the Supreme Court has held appropriate for use in the case of emotionally less mature high school students. Because the reasons underlying the deference with respect to the regulation of the speech rights of high school youths do

not apply in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish, I cannot agree with Judge Graber's conclusion that the First Amendment standard established in *Hazelwood* applies at the university level.

Even were the *Hazelwood* standard applicable to this case, I would vigorously disagree that a university's decision to withhold a graduate student's degree for almost a year, despite the fact that he has successfully completed his masters thesis and complied with all of the department's other academic requirements, is a "reasonable" response to his attachment to his chemistry thesis of a one and a half page prefatory disacknowledgments section in which he caustically expresses his view that university and other public officials obstructed rather than aided his progress toward a graduate degree. Nor, in my opinion, is it a reasonable response to such expressive conduct for the university to exacerbate its retaliatory action by placing the offending graduate student on academic probation for the period during which his degree is being withheld, thus making him ineligible for a teaching or research position or for financial support.

The university's extreme actions in response to Brown's speech — speech that was highly critical of university and other public officials — raises a genuine question of material fact as to whether the university punished him because of the viewpoint he sought to express or whether, as the Judge Graber appears to believe, it simply desired to further a legitimate pedagogical concern. Thus, a genuine issue of fact as to the university's extreme actions exists even if, as I willingly assume for purposes of this dissent, the university had the right to refuse to file Brown's thesis in the library archives as long as he insisted that it not be filed without the hostile disacknowledgments. Summary judgment was therefore wholly inappropriate.

Of equal importance, Judge Graber's rejection of Brown's principal constitutional claims is based entirely on a false premise. She begins her opinion by assuming, contrary to fact, that the university's refusal to approve of Brown's disacknowledgments statement and to file his thesis with the disacknowledgments in the library archives *required* it to withhold his degree for almost a year and to deprive him of university financial assistance by placing him on academic probation.[1] On the basis of that incorrect assumption, she concludes that we need not discuss Brown's claims that the withholding of his degree and the imposition of financial sanctions constituted punishment for the expression of his views. Specifically, she contends that Brown cannot state separate First Amendment claims for the university's decisions to withhold his degree and to place him on academic probation because those decisions were nondiscretionary and were compelled by the university's earlier decision not to approve his thesis with the disacknowledgments statement included. However, that contention is plainly incorrect. The fact that the university had no quarrel with the academic content of Brown's thesis and that

[1]In footnote 2 of her opinion, Judge Graber contends that the university was following its "mandatory policy" when it withheld Brown's degree. The "policy" to which she refers, however, simply does not exist. There is no policy in the record that requires that, in order to obtain a degree, a student, in addition to completing all of the academic requirements for a master's degree, must file his thesis in the university's library archives. With respect to the policy that is in the record, there is at best a genuine issue of fact as to whether the meaning Judge Graber's opinion ascribes to its vague terms is plausible. Moreover, there is nothing in the record suggesting that the university has *ever* refused to award a master's degree to a graduate student who has complied with all of the academic requirements simply because the student wanted to add an acknowledgments or disacknowledgments statement to his thesis. If anything violates the university's policy and does so for the first time, it is not, as Judge Graber's opinion states, the university's belated decision to grant a student the degree he had earned; rather, it is the withholding of a degree for almost a year from a graduate student who had completed all of the academic requirements for his degree, including the completion of a master's thesis, merely because he wanted to include a prefatory disacknowledgments statement.

it did indeed confer his degree on him after withholding it for almost a year, even though he continued to refuse to submit a revised thesis without the disacknowledgments statement, demonstrates beyond any question that the university did have the discretion to confer the degree and totally belies Judge Graber's *ipse dixit* assertion to the contrary.[2] Thus, without any basis in fact or law, Judge Graber simply refuses to confront, or even discuss, the principal constitutional issues presented in this case — whether the university's allegedly retaliatory and punitive actions denying Brown the right to graduate and to receive financial assistance during his involuntary extended tenure as a graduate student violated his First Amendment rights.

Judge Ferguson similarly avoids the principal constitutional issues in this case by simply stating that Brown was punished, not on the basis of his views, but rather because of "the academically dishonest manner in which [he] tried to publish his 'Disacknowledgments.' " This assumption, however, is also not supported by the factual record. The university was not interested in punishing Brown for "cheating." It was perfectly willing not to discipline him at all for his "deception." In fact, it was willing at all times to file the thesis in the library archives and give Brown his degree, without imposing any discipline whatsoever, if he would simply remove the disacknowledgments statement or allow the librarian to do so. It later awarded him the degree despite his refusal to remove the statement, not because he had received adequate punishment, but because it changed its mind about continuing to wage the battle at that escalated level. In fact, it appears to me that the university was not nearly as affronted as Judge Ferguson by

[2]Moreover, the fact that Brown was notified of the university's decision to award him a degree two days after a producer from "ABC's Nightly News with Peter Jennings" interviewed university officials about Brown's disacknowledgments and three weeks after ABC first contacted the university about Brown's complaints raises a substantial question about the university's motivation for withholding the degree for the preceding year.

Brown's act of inserting an unauthorized disacknowledgments statement as a preface to his thesis. It simply did not want to place the thesis in the library as long as it included the disacknowledgments. At the very least, there is a genuine issue of fact as to whether the university was motivated by a desire to punish Brown for making post-approval modifications to the thesis or by its disagreement with the views that he expressed in the disacknowledgments.

It may be helpful to re-state at this point the history of this dispute. The question we must decide is whether Brown has raised a genuine issue of material fact as to whether the university punished him for the views he sought to express. There can be no question that the substantive portion of Brown's thesis — his work on the morphology of calcium carbonate — was approved by his thesis committee and that, had nothing further occurred, he would have graduated shortly thereafter. Following the approval of the thesis, however, Brown inserted as a forward a disacknowledgments statement. It was in response to this one and a half page insert that the university decided to withhold Brown's degree for almost a year (until sufficiently pressured to do otherwise) and to deprive him of financial support during that period by placing him on academic probation. Judge Graber ignores the questions raised by the drastic sanctions that the university imposed on Brown's speech. In both the introduction and conclusion sections of her opinion, she characterizes this case as one involving only a thesis committee's decision "not to approve" of or "assign a passing grade to" Brown's thesis.[3] She applies the First Amendment standard she would have us adopt to that action only and fails to discuss entirely how the

[3]She argues that the university did not approve the thesis because, so long as the disacknowledgments were included, it was not in a proper academic format. She also says that it is an appropriate pedagogical function to teach graduate chemistry students how to write optional acknowledgments, and, apparently, that if they have not learned that skill, they are not qualified to receive advanced degrees in chemistry.

excessive punishment could be justified in light of the Free Speech Clause. Brown's complaint, as well as the record on summary judgment, clearly demonstrates, however, that this case is about much more than the mere decision not to approve the disacknowledgments or the ensuing decision not to permit the placement of the thesis in the library.[4]

In the first paragraph of his complaint, Brown states that he is suing for "declaratory relief and . . . damages" because "his degree was withheld from him" in violation of the First Amendment. Moreover, Brown's first claim for relief in the complaint, asserts that "[d]efendants' decision *to withhold plaintiff's Master's Degree* because of his critical comments . . . was an unconstitutional infringement" on his First Amendment rights (emphasis added).

The university's decision to withhold Brown's degree for almost a year after he had completed all of the academic requirements to earn a degree appears to be clearly unreasonable. More important, for purposes of this appeal, the university's drastic actions raise a genuine issue of material fact as to whether the sanctions it imposed on Brown were motivated by a desire to punish him because of the views he sought to express or were simply designed to further its legitimate pedagogical concerns in some manner. Such questions are ordinarily not appropriate for decision on summary judgment, *see, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) ("[I]t was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage."), and this case is no exception. Accordingly, I would permit Brown to present his First Amendment arguments to a jury, as the Constitution requires.

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[4]Judge Ferguson also discusses only the university's refusal to publish the thesis. However, having resolved the factual dispute over the university's reason for disciplining Brown in favor of the university, on the basis of dishonesty, a theory not even argued by that body, it would appear that the First Amendment would not affect his judgment as to the excessive punishment question.

I. *Hazelwood*'s standard does not apply to college and graduate school student speech.

I vehemently disagree with Judge Graber's conclusion that *Hazelwood* provides the appropriate First Amendment standard for college and graduate student speech and begin this section by emphasizing that her opinion on this point is hers alone and is not joined by any other judge on this panel. Thus, her desire to import the *Hazelwood* standard into the university context does not constitute binding precedent. Rather, the appropriate speech standard for college and graduate students speech remains an open question in this circuit. It is precisely because the question remains an open one here and elsewhere that I address Judge Graber's analysis in some depth and explain why *Hazelwood*'s deferential standard is inappropriate for college and graduate student speech.

In *Hazelwood*, the Court addressed the degree of First Amendment protection available to *high school* student speech and held that *high school* educators "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273; *see also Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (applying the *Hazelwood* standard to the speech of a *junior* high school student writing a research paper). In so holding, the *Hazelwood* Court emphasized that a First Amendment standard that is more deferential to school officials is appropriate in a high school setting because high school students are young, emotionally immature, and more likely to be inappropriately influenced by school-sponsored speech on controversial topics. *Hazelwood*, 484 U.S. at 272 ("[A] school must be able to take into account the emotional maturity of the intended audience. . . ."); *see also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-84 (1986) (emphasizing that one reason why high school officials should be accorded more deference to limit student speech is because a high school

audience is "less mature"); *Planned Parenthood of Southern Nevada, Inc. v. Clark Cty Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (discussing the immaturity of a high school audience and stating that the First Amendment standard applicable to high school student speech must provide educators with "the ability to consider the emotional maturity of the intended audience").

The Supreme Court has recognized that college and graduate students, unlike high school students, are more mature, independent thinkers who are less likely to be influenced by the school-sponsored publication of controversial ideas. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) ("University students are, of course, young adults. They are less impressionable than younger students."); *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (recognizing that "college students are less impressionable"). In fact, discussion of controversial ideas on a college campus is essential to the "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition" in the university setting. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 835 (1995). Vigorous debate on controversial topics is consistent with the Supreme Court's description of our college and university campuses as "vital centers for the Nation's intellectual life." *Id.* at 836; *see also Widmar*, 454 U.S. at 268 n.5 ("The college classroom with its surrounding environs is peculiarly the marketplace of ideas." (internal quotations omitted)).

Because college and graduate school students are typically more mature and independent, they have been afforded greater First Amendment rights than their high school counterparts, just as they have been afforded greater legal rights in general. Along with the right to vote, most college and graduate school students are permitted to drive automobiles, to purchase cigarettes, to marry, and even to join the military; many high school students do not enjoy any of these rights or privileges. Similarly, most college students and almost all graduate

students may legally consume alcohol, a right not generally available to high school students. Although we have not explicitly addressed how much protection to give the First Amendment rights of college and graduate school students, we have recognized that

> [d]ifferent considerations govern application of the first amendment on the college campus and at lower level educational institutions. The activities of high school students, for example, may be more stringently reviewed than the conduct of college students, as the former are in a much more adolescent and immature stage of life.

Nicholson v. Board of Educ. Torrance Unified Sch. Dist., 682 F.2d 858, 863 n.4 (9th Cir. 1982) (internal quotations omitted); *see also Mabey v. Reagan*, 537 F.2d 1036, 1046-47 (9th Cir. 1976) ("A college relies in large measure on faculty self-governance and its contributions to administrative decisions. This is analogous to, but different from a high school's need to 'discipline by . . . superiors.' "). In *Hazelwood* itself, the Supreme Court recognized that "the same degree of deference" shown to high school officials may not be "appropriate" when analyzing the First Amendment protection available to "school-sponsored expressive activities at the college and university level." *Id.* at 273 n.7. When discussing the First Amendment rights of college students generally, the Supreme Court noted that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972); *see also Board of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 239 n.4 (2000) (emphasizing that "the right of teaching institutions to limit expressive freedom of students ha[s] been confined to high schools . . . , whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education.").

Judge Graber's suggestion that we import the *Hazelwood* standard into the college and university context is particularly unfortunate, because the standard is a deferential one that courts often use to justify highly questionable actions by high school educators that restrict controversial speech. *See, e.g., Planned Parenthood*, 941 F.2d at 829 (holding that the school district's justification for refusing to publish family planning advertisements was reasonable under the *Hazelwood* standard); *Fleming v. Jefferson County Sch. Dist.*, No. 01-1512, 2002 WL 1380930 (10th Cir. June 27, 2002) (upholding a school district's guidelines restricting a tile painting project at area high schools under the *Hazelwood* standard); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999) (holding that school board's decision to prohibit the high school marching band from performing a song that it interpreted as promoting the illegal use of drugs was reasonable under *Hazelwood*).

Recognizing that college and graduate student speech should be entitled to greater First Amendment protection than that of high school students, the Sixth Circuit has explicitly declined to apply *Hazelwood*'s deferential First Amendment standard in the university setting. *See Kincaid v. Gibson*, 236 F.3d 342, 354 (6th Cir. 2001) (en banc). In *Kincaid*, a public university attempted to suppress the speech of some of its college students by withholding publication of the school yearbook. *Kincaid*, 236 F.3d at 345-46. The Sixth Circuit, on rehearing en banc, held that the *Hazelwood* standard was inapplicable and instead concluded that the yearbook was a limited public forum in which viewpoint discrimination was impermissible and content-based regulations were permissible only when narrowly drawn to effectuate a compelling state interest. *Id.* at 354; *see also Student Govt. Ass'n v. Board of Trustees of the Univ. of Mass.*, 868 F.2d 473, 480 n.6 (1st Cir. 1989) (stating that the *Hazelwood* standard does not apply to a college newspaper).

Judge Graber attempts to distinguish the First and Sixth Circuit decisions from the instant case by characterizing the

student speech in college yearbooks and newspapers as extracurricular speech that is entitled to broader First Amendment protection than the curricular speech at issue here. Her suggested distinction between curricular and extracurricular speech, however, is belied by the Supreme Court's analysis in *Hazelwood* itself. *Hazelwood* involved a challenge to the school's censorship of a high school newspaper. The Court specifically stated that "school-sponsored publications [and] theatrical productions" that are "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences" are examples of expressive activities that "bear the imprimatur of the school" and are therefore subject to the *same* degree of First Amendment scrutiny as curricular speech, even if they do not "occur in a traditional classroom setting." *Hazelwood*, 484 U.S. at 271; *see also Planned Parenthood*, 941 F.2d at 827 (interpreting the Supreme Court's *Hazelwood* decision and holding that "the Court intended that the *same* principles that animate educational decisions . . . come into play when determining what advertisements are suitable for publication in school newspapers, yearbooks and athletic programs" (emphasis added)). The yearbook at issue in *Kincaid* was under the management of a "Student Publications Board" consisting of "faculty[ ] and university officials," as well as students. *Kincaid*, 236 F.3d at 349. Thus, student speech in the yearbook was just as likely to be perceived by members of the public "to bear the imprimatur of the school" as student speech in a curricular context. *Hazelwood*, 484 U.S. at 271. Despite the evident similarity in subject matter in *Hazelwood* and *Kincaid*, the Sixth Circuit refused to apply the *Hazelwood high school* standard to a *university's* decision to withhold publication of a yearbook and instead applied a standard that was more protective of university students' First Amendment rights. When discussing its rationale, the *Kincaid* court emphasized the fact that university students are "less impressionable than younger students" and noted that "[t]he danger of chilling . . . individual thought and expression . . . is especially real in the Uni-

versity setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Kincaid*, 236 F.3d at 352 (quoting *Widmar*, 454 U.S. at 274 n.14, and *Rosenberger*, 515 U.S. at 835-36). Thus, Judge Graber's purported curricular/extra-curricular distinction provides no basis for distinguishing *Kincaid* and *Student Government Association* and is disingenuous at best.

Because I believe that the First and Sixth Circuits appropriately afforded college and graduate student speech, whether curricular or extracurricular, greater First Amendment protection than high school student speech, and because the importation of the *Hazelwood* standard into the college and graduate school context would dilute the free speech rights of all students attending public institutions of higher learning, I respectfully disagree with Judge Graber's conclusion that *Hazelwood*'s reasonableness standard should apply to Brown's First Amendment claims.

II. There are a number of more speech-protective standards that could be applied to college and graduate student speech.

Although our three-way set of opinions leaves open the question of what First Amendment standard applies to the regulation of college and graduate student speech, it is worth considering what that standard might be. There are a number of possible standards that are more protective of student speech than the *Hazelwood* standard, and yet still respect a university's need to further its legitimate pedagogical purposes. I will mention only two.

First, there is the limited or designated public forum in which the government opens a forum "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802

(1985). In a limited public forum, the government may impose reasonable time, place, and manner restrictions on speech; viewpoint-based restrictions are impermissible; and all content-based restrictions must be narrowly drawn to effectuate a compelling state interest. *Id.* This is the standard that the Sixth Circuit applied in *Kincaid* when it held that the university's yearbook constituted a limited or designated public forum in which content-based regulations were subject to strict scrutiny review. *Kincaid*, 236 F.3d at 347, 354.[5]

Another possibility is to adopt an intermediate level of scrutiny for regulations of student speech in college and graduate programs. *Cf. United States v. Virginia ("VMI")*, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to gender-based classifications in equal protection jurisprudence). Under an intermediate level of scrutiny, the university would have the burden of demonstrating that its regulation of college and graduate student speech was substantially related to an important pedagogical purpose. *Id.* at 533. Although intermediate scrutiny is more protective of First Amendment speech rights than the *Hazelwood* standard, it affords more deference to educators' content-based decisions than does the strict scrutiny standard that applies under a limited public forum analysis.

When determining what standard is appropriate for analyzing regulations of college and graduate student speech, it is important to distinguish student speech from university speech, teacher or other employee speech, and the speech of private individuals using the university's facilities. *Cf. Rosenberger*, 515 U.S. at 833-34 (distinguishing between a university's right to determine the content of the education that it provides, which is the university's speech, and the university's ability to regulate the speech of private individuals who

[5]The Foundation for Individual Rights in Education, Inc., participating in this case as *amicus curiae*, contends that limited public forum analysis should apply to the university's actions in this case.

use its facilities). It may be that different First Amendment standards are applicable in different contexts to restrictions imposed at the university level depending on both the speaker and the nature of the particular forum. For purposes of this dissent, I need not decide what standard(s) of review is appropriate for analyzing a university's attempts to regulate college or graduate student speech in general, or Brown's in particular, because, regardless of what standard is deemed applicable, Brown has established a genuine issue of material fact as to the university's motivation for imposing such extreme sanctions in response to his attempt to add a disacknowledgments section to an already-approved thesis. The constitutional questions in this case cannot be resolved on summary judgment, regardless of the standard employed.[8]

III. Even if *Hazelwood* were the applicable standard, the University's decisions to place Brown on academic probation and to withhold his degree for almost a year would raise genuine issues of material fact that preclude summary judgment.

Even under *Hazelwood*'s highly deferential standard, questions of material fact remain that preclude summary judgment. When applying the *Hazelwood* standard, we first balance the totality of the school's actions — particularly its decisions to withhold Brown's degree for almost a full year and to place him on academic probation for that period, thus making him ineligible for a university teaching or research position or for financial support — against the university's

[8]I reiterate that I assume throughout this opinion that the university had a right not to approve the prefatory disacknowledgments statement and to refuse to place the thesis in its library so long as Brown insisted on attaching that statement to the thesis. My colleagues may well be correct that the university's actions in that respect do not offend the First Amendment under any appropriate standard, even though they disagree on the reasons for reaching that conclusion. That, however, disposes of only one issue, a comparatively minor one as far as I am concerned, and does not resolve Brown's principal constitutional claims.

purported pedagogical concern — its interest in ensuring that graduate students write theses that not only meet all of its academic standards but also conform to the "proper format" for a scientific paper — in order to determine whether the university's actions were "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Here, the university's imposition of so extreme a sanction appears grossly disproportionate when balanced against the minor nature of Brown's alleged transgression and against its own interest in ensuring that all of its rules and regulations are fully complied with and that all of its students learn how to follow the proper format for scientific and other academic papers. The unusual severity of the actions taken by the university is sufficient in itself to raise a genuine issue of material fact as to whether its decisions to withhold Brown's degree for almost a year and to place him on academic probation during that time are "reasonably related" to a legitimate pedagogical purpose.

The record clearly does not permit us to determine at the summary judgment stage of the proceedings the university's motivations in imposing so extreme a sanction on Brown. In this circuit, *Hazelwood*, like all the other standards I have discussed, prohibits school officials from discriminating against student speech on the basis of viewpoint. *See Planned Parenthood*, 941 F.2d at 829-30 (holding that *Hazelwood* requires, consistent with First Amendment jurisprudence in other contexts, that all restrictions on student speech be viewpoint neutral); *see also Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010-11 (9th Cir. 2000) (stating that restrictions on school-sponsored speech in a nonpublic forum must be viewpoint neutral); *Rosenberger*, 515 U.S. at 829 ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."). Here, the university's draconian actions in response to Brown's unsuccessful attempt to publish his disacknowledgments raise a question of material fact about whether the university was motivated, not

by its asserted pedagogical purposes, but by a desire to punish Brown for the viewpoint that he sought to express by having his disacknowledgments included in the thesis.[7]

As I have noted, I do not question the university's rejection of the disacknowledgments as a part of the thesis, only the imposition of the punitive actions. It is significant, however, that in the disacknowledgments, Brown accused the Dean, the staff of the graduate division, the management of the university library, a former University professor, the former Governor, and the UC Regents of placing obstacles in his path toward obtaining a degree and castigated them for "being an ever present hindrance during [his] graduate career." Brown's views are certainly ones that Dean Li and the professors on Brown's thesis committee would find highly offensive. The extreme severity of the university's reactions — its decision to withhold Brown's degree for almost a year and to place him on academic probation, thus making him ineligible for a university teaching or research position and for financial support — is sufficient, standing alone, not only to raise a question of gross disproportionality but to raise a question of fact as to whether it was Brown's insistence on publishing the hostile views expressed in the disacknowledgments and not his mere non-compliance with the "proper format for a scientific paper" that motivated the University to impose such harsh sanctions.

[7]Judge Ferguson resolves the disputed issue of fact by declaring that the university's actions were motivated by a desire to punish Brown for sneakily and dishonestly inserting unauthorized material into his thesis after it had already been approved. The record, as I read it, does not support this conclusion. The university's offer to afford Brown all of the same benefits that he would have received before he "cheated" if he would simply remove the offending material from his thesis belies the argument that the sanctions were imposed to punish him for cheating. It seems to me far more likely that the sanctions were imposed because he insisted on attempting to publicize his unpopular views. At the very least, however, there is a question of fact about the university's motivation — a question that is not appropriately resolved on summary judgment.

The timing of the university's decision to award Brown his degree after almost a year also raises a question about its motivation for withholding the degree in the first instance. On May 11, 2000, a producer for "ABC's Nightly News with Peter Jennings" contacted Brown expressing interest in learning more about his struggle with the administration over his disacknowledgments section. University officials spoke with the producer on May 14, 2000 and Brown was interviewed on May 15, 2000. The very next day, Brown received a letter via Federal Express stating that the university had decided to award him a degree. The university contends that the timing was coincidence, that the Dean had requested a departmental recommendation on Brown's status a month before the interviews were conducted, and that the interview with university officials actually took place after they had decided to award Brown a degree. The university officials, however, admit that they were contacted by the producer during the last week of April or the first week of May, which, viewing the facts in the light most favorable to the non-moving party, is approximately three weeks before Brown received the federal express package stating that he was going to receive his degree. Ultimately, there is a question of fact about what motivated the university's decision to award Brown his degree and what, if anything, that reveals about its reasons for withholding the degree in the first instance. Certainly it raises a genuine issue of fact (to put it mildly) regarding Judge Graber's assertion that the university was compelled to withhold Brown's degree because he failed to submit a thesis in the required form.

One need only examine some of the acknowledgments that the university has accepted in the past to see that something more than the non-compliant format of Brown's disacknowledgments may have motivated the university's decision to withhold his degree and place him on academic probation. Other acknowledgments with equally offensive language were approved by the university with no adverse consequences for the author. For example, Dr. Mark Sanson Morey's disserta-

tion acknowledgment, which was approved by his thesis committee, contained the following statements:

> To: 1) the dips**ts who decided to put the P-chemists on the forth [sic] floor, 2) the inept facilities management monkey who raised the cooling water pressure and 3) the dumb ass who left his cooling water ON for a laser that was OFF for 2 years and subsequently flooded my lab, desk, and my most important files: may your bloated, limb-less bodies wash to shore and be picked clean by seabirds and maggots . . . .

While it is true, as Judge Graber states, that different thesis committees are likely to apply the university's standards differently, the existence of other "non-conforming" acknowledgments that were approved without any adverse consequences for the author is relevant to the question of the university's reason for imposing such drastic sanctions on Brown. If non-compliance with the proper format for a scientific paper were the actual reason for the university's actions, dissertation acknowledgments like Dr. Morey's would also have been prohibited. Drawing all inferences in Brown's favor as we must when reviewing the district court's grant of summary judgment to the university defendants, there is a genuine issue of material fact about whether the university's purported reason for depriving Brown of financial support and the opportunity to graduate because of his insistence on including the disacknowledgments was pretextual, and whether the actual reason the university refused to allow him to receive financial benefits and permit him to graduate was that the administration sought to punish him for the viewpoint he tried to express when he insisted that his thesis include a prefatory one and a half page disacknowledgments statement castigating university and other public officials.

In sum, Brown has raised genuine issues of material fact as to whether the university defendants violated his First

Amendment rights, even under the most deferential First Amendment standard available — a standard that was clearly established at the time of the events in this case. Moreover, a reasonable school official would have known that, even under *Hazelwood*'s "reasonableness" standard, placing a graduate student on academic probation and withholding his degree for almost a year solely because he attempted to include a one and a half page statement highly critical of university and other public officials in his thesis would be unreasonable and would violate the student's First Amendment rights. Accordingly, I respectfully dissent from my colleagues' conclusions (implicit or explicit) on Brown's principal First Amendment claims. I would reverse the district court's grant of summary judgment in favor of the defendants in part, and remand in order to allow Brown to pursue those claims and to seek damages in connection with the principal First Amendment violations he alleges.

APPENDIX C

[Filed May 10, 2001]

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER TODD BROWN, Plaintiff, v. CHARLES LI, HENRY YANG, GALEN STUCKY, FRED LANGE, DANIEL E. MORSE, and SARAH PRITCHARD, Defendants.	CASE NO. 00-6492-RSWL AIJX SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

Defendants' Motion to dismiss or in the Alternative, for Summary Judgment, came on regularly for hearing before this Court on April 30, 2001. Christopher Patti appeared on behalf of defendants and moving parties, Paul Hoffman appeared on behalf of plaintiff.

After considering the moving and opposition papers, arguments of counsel and all other matters presented to the Court, and for the reasons set forth in the separate Findings of Uncontroverted Fact and Conclusions of Law, and good cause appearing therefore,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That defendants' alternative Motion for Summary Judgment is GRANTED;

2. That plaintiff take nothing and that the action be dismissed on the merits;

3. That defendants recover their costs of suit.

Dated: May 9, 2001

Ronald S. W. Lew
United States District Judge

Defendants' Motion for Summary Judgment on the Alternative for Summary Judgment based on Plaintiff's Motion for Summary Judgment on April 9, 2001. Christopher Ford appeared on behalf of defendants and Roger Fendig, Esq. appeared on behalf of plaintiffs.

After considering the arguments and supporting papers, arguments of counsel and all other matters presented to the Court and for reasons set forth in the separate findings of fact and conclusions of law and good cause appearing therefor,

IT IS HEREBY ORDERED AND ADJUDGED:

1. That defendants' Alternative Motion for Summary Judgment is GRANTED.

2. That plaintiff take nothing, and that the action be dismissed on the merits.

3. That defendants recover their costs of suit.

Dated: May 9, 2001

Ronald S. W. Lew
United States District Judge

[Filed May 10, 2001]
[Entered May 11, 2001]

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHRISTOPHER TODD BROWN,	) CASE NO. 00-6492-RSWL AIJX
Plaintiff,	) ~~[PROPOSED]~~ FINDINGS
v.	) OF UNCONTROVERTED FACT AND
CHARLES LI, HENRY YANG, GALEN STUCKY, FRED LANGE, DANIEL E. MORSE, and SARAH PRITCHARD,	) CONCLUSIONS OF LAW) Date: April 30, 2001) Time: 9:00 a.m.) Courtroom: 21) Honorable Ronald S.W. Lew
Defendants.	)

Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, originally came on for hearing on January 8, 2001. The Court granted plaintiff's request, made pursuant to Federal Rule of Civil Procedure 56(f), for a continuance to permit plaintiff to take depositions and discovery and to allow the parties to supplement their papers, and the continued hearing was held on April 30, 2001. Based on the papers filed in support and opposition to the motion, on the arguments advanced at the hearing, and on all matters properly a part of the record, the Court makes the following Findings of Uncontroverted Facts and Conclusions of Law. Any Finding of Uncontroverted Fact that is deemed more appropriately characterized as a Conclusion of Law is incorporated as a Conclusion of Law, and any Conclusion of Law that is deemed more appropriately characterized as an Uncontroverted Fact is incorporated as an Uncontroverted Fact.

I. UNCONTROVERTED FACTS

1. Prior to May 2000, plaintiff was a graduate student in the master's degree program of the Department of Materials Sciences at the University of California at Santa Barbara ("UCSB"). Defendants Galen Stucky, Frederick Lange and Daniel Morse were the members of plaintiff's thesis committee; defendants Charles Li and Henry Yang are, respectively, the Dean of the Graduate Division and the Chancellor at UCSB.

2. UCSB Graduate Division regulations provide.

(a) that master's degree candidates must submit their master's degree theses to the members of their thesis committees for approval;

(b) that the student and committee are jointly responsible for "everything between the margins" of the thesis;

(c) that immediately following the title page of the thesis is an approval page which must be signed by the committee members certifying their approval of the thesis;

(d) that in reviewing and evaluating a thesis, the committee is to apply standards of the academic discipline that govern the form, content and presentation of scholarly publications;

(e) that a student may include an acknowledgments section in a thesis "to acknowledge particular persons who helped you;" and

(f) that, as a condition of receiving the degree, students submit the approved version of the thesis to the UCSB Davidson Library, where approved theses are placed in the Library's collection and made available to the public.

3. In the spring of 1999, plaintiff submitted his thesis to the members of his committee, who approved it. Prior to submitting the thesis to the Library, and without the knowledge of the committee members, plaintiff inserted a page titled "Disacknowledgments" immediately after the signed approval page. The "Disacknowledgments" contained profanity and criticisms of University administrators and the Governor of California.

4. The matter was referred by the Library to Dean Li and by him back to the thesis committee. The committee members reaffirmed their approval of the thesis as submitted to them, but refused to approve addition of the "Disacknowledgments" because they believed that it was unprofessional, inappropriate, and violated publication standards for acknowledgments in

scientific papers. They also did not want their names associated with it.

5. Plaintiff was informed that he could obtain his degree by submitting the approved thesis (without the "Disacknowledgments") to the Library, but he refused to do so.

6. Instead, after meeting and discussing his position with some of the committee members and Dean Li, plaintiff appealed the committee's decision to a series of University bodies, which included: (1) a written appeal to the Academic Affairs Committee of the Department of Materials; (2) a written appeal to Associate Dean of the Graduate Division Diane Mackie; (3) a written presentation to the UCSB Graduate Council; and (4) a meeting with the Chair of the UCSB Academic Freedom Committee, and written presentations to the entire Committee. All considered and rejected plaintiff's appeal.

7. In May 2000, as the time limit for plaintiff to receive his degree or face academic dismissal approached, the University granted him the degree on the basis of the approved thesis.

8. The University continues to refuse to place plaintiff's thesis with Disacknowledgments in the public collection of the Davidson Library.

9. Plaintiff's first and third claims for relief assert that defendants' refusal to grant his degree prior to May 2000 violated plaintiff's free speech rights under the United States and California constitutions. The second claim for relief asserts that defendants violated plaintiff's due process rights. Pursuant to the first three claims, plaintiff seeks an award of damages against defendants Li, Yang, Stucky, Lange and Morse.

10. Plaintiff's fourth claim seeks an injunction compelling defendants to add the thesis with

Disacknowledgments to the Library's public collection and a declaration that their failure to do so violates the Constitution.

11. Defendants Li, Yang, Stucky, Lange and Morse moved for dismissal or summary judgment on the first three claims under the doctrine of qualified immunity and all defendants moved for dismissal or summary judgment on the fourth claim for failure to state a claim upon which relief could be granted.

II. CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction pursuant to 28 United States Code section 1331.

2. Venue is proper in this judicial district pursuant to 28 United States Code section 1391(e).

3. Pursuant to Federal Rule of Evidence 201, the Court grants defendants' request that it take judicial notice of the UCSB Guide to Filing Theses and Dissertations and the UCSB Graduate Handbook.

4. The doctrine of qualified immunity shields public officials from civil liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.

5. There is no "clearly established" right of students to be free from content-based evaluation of their academic work by their teachers and professors. Although public educational institutions must respect the free speech rights of students, e.g., *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503, 512, those rights do not prevent educators from evaluating student academic work. Rather,

universities an their faculty have significant discretion in evaluating student academic work and counts should avoid interfering with such judgment. E.g., *Regents of University of Michigan v. Ewing* (1985) 474 U.S. 214, 225; *Zukle v. Regents of University of California* (9th Cir. 1999) 166 F.3d 1041, 1047. Therefore, educators have broad discretion to evaluate student work based on the content of speech. *Settle v. Dickson County School Bd.* (6th Cir. 1995) 53 F.3d 152, 155-56.

6. Individuals, including the members of plaintiff's thesis committee, also have the constitutionally protected discretion to refuse to associate with speech with which they disagree. See, e.g., *Pacific Gas & Elec. V. California P.U.C.* (1986) 476 U.S. 1.

7. The judgment of the University that thesis acknowledgments should be subject to review and approval by thesis committees and the judgment of plaintiff's thesis committee that the "Disacknowledgments" did not meet professional standards as required by University policy are both well within the legitimate scope of defendants' academic discretion and do not violate any "clearly established" right of plaintiff.

8. The requirements of due process "apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth* (1972) 408 U.S. 564, 569. "A protected property interest exists if there is a 'legitimate claim or entitlement' to a specific benefit .... A subjective expectancy creates no constitutionally protected interest." *Goodisman v. Lytle* (9th Cir. 1984) 724 F.2d 818, 820.

9. Plaintiff had no clearly established property interest in receiving a degree, since his right to the degree was contingent, by University regulations, on his submission on an *approved* thesis to the Library.

10. Even assuming that plaintiff did have a property interest in receiving a degree, he was afforded adequate process. There is no established right to a due process hearing in cases, like this one, involving academic evaluations. See *Board of Curators, Univ. of Mo. V. Horowitz* (1978) 435 U.S. 78, 90. "[T]he right to a due process hearing at all, where the action under review is a decision involving 'academic evaluations,' is doubtful, if not non-existent." *Clark v. Whiting* (4th Cir. 1979) 607 F.2d 634, 643. Even in cases involving disciplinary dismissal – where the Supreme Court has imposed greater due process requirements – all that is required is "an 'informal give-and-take' between the student and the administrative body dismissing him." *Board of Curators, Univ. of Mo. V. Horowitz, supra,* 435 U.S. at 86.

11. Plaintiff received more notice and opportunity to be heard than is required even for a disciplinary dismissal.

12. There is no constitutional right to compel a library to include in its collection a student thesis that has not yet been approved. Although library *patrons* have been recognized to have a First Amendment right to prevent a library from *removing* materials from its collection 'in a narrowly partisan or political manner," *Board of Education v. Pico* (1982) 457 U.S. 853, 870, that right does not limit a public library's decision to *add* materials to a library's collection. *Id.* at 871. Nor doe authors have any recognized right to insist that libraries obtain their works.

13. Further, the *Pico* plurality held that even removal decisions resulting from "established, regular, and facially unbiased procedures" would not violate the First Amendment. *Id.* at 874. Here, pursuant to established University rules, the "Disacknowledgments" was never eligible for inclusion in the Library because it was never approved by a thesis committee.

14. There exists no genuine issue of material fact, and defendants are entitled to judgment as a matter of law on all plaintiff's claims for relief.

Dated: May 9, 2001

Ronald S. W. Lew
United States District Judge

13. Further, the Court plainly held that every reasonable decision resulting from establishment, regulation, and faithful enforcement of zoning must not violate the First Amendment. *Id.* at 613. Here, consistent with established University rules, the Detachment assignments were never eligible for inclusion in the Library because it was never required for a threat countermeasure.

14. There are no genuine issues of material fact, and defendants are entitled to judgment as a matter of law on all plaintiff's claims for relief.

Dated, May 5, 2008.

Ronald S. W. Lew
United States District Judge

APPENDIX E

Disacknowledgements

I would like to offer special Disacknowledgements to the following degenerates for being an ever-present hinderance during my graduate career...

To the Dean and staff of the Graduate Division,

You fascists are the largest argument against higher education there has ever been. Any claims you make as an ally and resource for students in an utter sham. All dealings with you have ended in sheer frustration. I'd rather take a hot stick in the eye then deal with your bureaucratic nonsense. An especial disacknowledgement to David Fishman whose officious, blind devotion to absurd rules provides disservice to both education and the university.

To the entire management of the Davidson Library,

Your strict adherence to self-serving draconian policy has made it a supreme displeasure to work in your vicinity. Incomprehensible fines, unwillingness to help and general poor attitude has made most library visits an ogre. I trust your incompetence will preside over the continued decline in library quality.

To Professor Fred Wudl (formerly of UCSB, tenured at UCLA),

For failing to realize that your professorship and tenure doesn't give you the privilege of disrespectful and cruel treatment of your students and employees. Further, it has surprised me that your arrogance and proclivity at being an ass can affect even those isolated from your presence. It is my supreme pleasure to never have associations with you again.

To Former Governor Pete Wilson,

A supreme government jerk who has personally overseen the demise of the university. You policies have 1) raised tuition and fees fourfold since my first association with the university, 2) dismantled and traded some of the most competent senior faculty, and 3, generally hurt as many people as possible. For these, I wish you to never wield any governmental power again as you have surely proved your ineptitude.

To the UC Regnets,

Whose continued suppression of graduate students, your most loyal employees, serves as a paragon of corrupt management. May your continually biased and corrupt practices be fraught with continued controversies brought upon by the students who you offer a fatuous disservice.

And

To Science,

For being a hollow specter of what you should be. Your vapid coneits have rendered those in your pursuit lifeless, unfeeling zombies. If I can forever escape you, the better I will be.

CHRISTOPHER T. BROWN
14 JULY 1999
2nd Edition

First Edition was drafted and written on 7APRIL1999 and subsequently censored by myopic action of official at the University of California, Santa Barbara.

Thanks to My Adviser, May He Rot in Hell -- Free speech has its limits, the 9th Circuit rules, and one of them is the acknowledgments in a master's thesis.

San. Francisco. Daily Journal - Aug 13, 2002
http://www.dailyjournal.com

By Pamela A. MacLean

Daily Journal Staff Writer

SAN FRANCISCO - Free speech does not give a graduate student the right to a passing grade on a master's thesis that is academically acceptable but includes caustic "disacknowledgments" critical of the graduate school and its dean, a splintered federal appeals panel ruled Monday.

The 2-1 vote by the 9th U.S. Circuit Court of Appeals included three separate opinions, and none of the three judges appeared to agree on the legal standard to apply in the academic free speech question raised by the dispute. *Brown v. Li*, 2002 DJDA 9195.

The decision leaves an open question in the 9th Circuit whether a 1988 Supreme Court decision limiting free speech rights for high school students should also extend to college and university students, a question also left unanswered by the high court in *Hazelwood School District v. Kuhlmeir*, 484 U.S. 260.

The plaintiff, Christopher T. Brown, a master's candidate in the Department of Material Sciences at the University of California, Santa Barbara, received a passing grade and approval of his thesis, "The Morphology of Calcium Carbonate: Factors Affecting Crystal Shape," in 1999.

After the approval, Brown added an acknowledgments page that had not been seen by his thesis

committee. It was entitled "Disacknowledgments" and stated, "I would like to offer special f--- you's to the following degenerates for of [sic] being an ever-present hindrance during my graduate career ..." He then listed the dean and staff members of the graduate school, the university regents, library managers and even former Gov. Pete Wilson.

His committee and the school refused to grant his degree and the library refused to admit the thesis, a requirement for receiving a degree, until he changed the offending section.

Brown pointed to other master's theses that included acknowledgments to pets, family and friends, negative statements about inferior chemistry facilities, and even poetry, arguing there was no adherence by the school to any standard.

The university maintained that master's theses must adhere to academic publication standards to teach students how to present research results.

Brown spent more than a year battling the university over his right to publish the acknowledgments, and he was placed on academic probation. Brown finally was granted his degree May 15, 2000, one day after ABC's "Nightly News with Peter Jennings" contacted the school and expressed interest in a story about his struggles with the administration, according to the court. However, the paper was never admitted into the school library's collection.

Brown sued for damages, claiming he was unable to get work for a year because of the delay. The case was dismissed by a district judge. The appeals court Monday upheld that ruling but remanded the case, telling the district judge to explain the basis for dismissing Brown's separate claims based on the California Constitution.

Judge Susan Graber wrote that the only analogous case was the U.S. Supreme Court's decision in *Hazelwood,* holding that high school officials do not violate free speech rights when they prohibit publication in a high school newspaper of stories officials find objectionable.

Graber said she would extend the high court's rationale to college and university students as well, even though the Supreme Court expressly declined to rule on whether *Hazelwood* extended that far. Two circuits since *Hazelwood* have explicitly declined to apply the case to the university setting: the Cincinnati-based 6th Circuit in *Kincaid v. Gibson,* 236 F.3d 342 (2001) and Boston's 1st Circuit in *Student Govt. Ass'n v. Board of Trustees of the Univ. of Mass,* 868 F.2d 473 (1989).

But Graber reasoned those cases applied to extracurricular student speech in college yearbooks and newspapers that are entitled to broader First Amendment protection. She argued that Brown's thesis and rules governing its form were part of the school curriculum and subject to more stringent control by the school.

"We do not know with certainty that the Supreme Court would hold that *Hazelwood* controls the inquiry into whether a university's requirements for and evaluation of a student's curricular speech infringe that student's First Amendment rights," Graber wrote. "Nevertheless, of all the Supreme Court cases, *Hazelwood* appears to be the most analogous to the present case."

Judge Warren Ferguson, who joined Graber in a separate opinion, said he agreed that Brown's First Amendment rights were not violated but said the case should be dismissed for another reason.

He defined the case as an "erosion of academic integrity" and accused Brown of simply deceiving the thesis committee by not showing them the acknowledgments and trying to shield his conduct behind free speech.

Judge Stephen Reinhardt vehemently dissented on the free speech issue.

"Regulation of the speech rights of high school youths [does] not apply in the adult world of college and graduate students, an arena in which academic freedom and vigorous debate are supposed to flourish," Reinhardt wrote.

He argued that extending the *Hazelwood* standard to college and graduate school "would dilute the free speech rights of all students attending public institutions of higher learning."

The *Hazelwood* section of the majority opinion "is [Garber's] alone and is not joined by any other judge on this panel. Thus, her desire to import the *Hazelwood* standard into the university context does not constitute binding precedent," he wrote.

Reinhardt suggested alternative standards for a future panel, including designating the thesis a "public forum" in which the government may impose only reasonable time, place and manner restrictions, not viewpoint-based restrictions. He also suggested intermediate-level scrutiny in which the university would have the burden of showing that its regulation was related to an important pedagogical purpose.

Brown's attorney Paul L. Hoffman, of Schonbrun Desimone Seplow Harris & Hoffman in Venice, said he was particularly disappointed with the way Graber and Ferguson dealt with the record in the case.

He promised to seek en banc reconsideration by the court. "There is a significant issue about protection of

graduate students' free speech rights," he said.

"It is our view that the university does not have the right to engage in viewpoint discrimination," Hoffman said.

Hoffman said Brown is traveling in Europe and is unaware of the decision. He is working in the computer field, not material sciences.

Christopher M. Patti, an attorney in the university general counsel's office, said he disagreed with Reinhardt's characterization of the two majority opinions. "Graber appears to be writing for a majority, and Ferguson is offering an additional rationale," he said.

It appears the majority would extend *Hazelwood* to university students, he said, and he called the standards proposed by Reinhardt "unworkable with respect to academic papers."

Patti also disputed the court's assertion that Brown got the degree only after ABC expressed interest in the dispute. He said there was a deadline that Brown either get his degree or be dismissed. "The university decided to save him from himself and give him the degree rather than dismiss him."

It is safe to say, Hoffman said, that the university got far wider publicity about Brown's criticism than if they had just quietly parked his thesis on the library's shelves. "It is hard to believe people reading that title would be clamoring for copies," he said.

Supreme Court, U.S.
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No. 02-1039

In The
Supreme Court of the United States

CHRISTOPHER TODD BROWN,

Petitioner,

v.

CHARLES LI, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus, Foundation for Individual Rights in Education ("FIRE"), is a nonprofit educational foundation devoted to free speech, individual liberty, religious freedom, the rights of conscience, legal equality, due process, and academic freedom on our nation's college and university campuses.[1] FIRE's mission is to defend and sustain individual rights at America's increasingly repressive colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience – the essential qualities of individual liberty and dignity. FIRE's core mission is to protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them.

Amicus has an interest in enforcing the First Amendment's prohibition against governmental interference in public debates, especially when those debates take place in our nation's institutions of higher learning. *Amicus* actively supports individuals in disputes within or against educational institutions, and attempts to educate college and university administrators about freedom of conscience. Because *Amicus* believes that the Ninth Circuit Court of Appeals' extension of the doctrine of *Hazelwood School Dist. v. Kuhlmeir*, 484 U.S. 260 (1988) to communications that take place on the nation's

---

[1] Pursuant to Supreme Court Rule 37.6, this brief is filed with the written consent of all parties. Written consent is filed with this Court. *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

campuses will have an impermissible chilling effect on Free Speech and Academic Freedom, it submits this brief *amicus curiae* in support of Petitioner.

REASON FOR GRANTING THE WRIT

1. In addition to the reasons set forth in Petitioners Brief, the Court should grant the Petition because the decision of the Ninth Circuit Court of Appeals poses a serious and immediate threat to Freedom of Speech, Freedom of Conscience and Academic Freedom on the campuses of our nation's colleges and universities. Those freedoms have come under increasing attack from administrators and government officials. If the decision below is not reversed, students and professors at America's institutions of higher education will be greatly deterred from addressing any of the important and controversial issues of our day. This chilling effect will deprive the public of the clash of competing viewpoints that undergirds the First Amendment.

2. Extending the rule of *Hazelwood* to institutions of higher education ignores the long history of freedom of debate, criticism, and comment upon which our great universities were founded. Allowing professors and students to freely explore and opine on the difficult and controversial issues of the day, while subjecting those opinions to the scrutiny and criticism of their learned peers, serves both the educational mission of these institutions and the greater public good, and has traditionally been protected from unwarranted governmental interference.

I. IF THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS ALLOWED TO STAND, IT WILL IMPERMISSIBLY CHILL SPEECH ON OUR NATION'S COLLEGE CAMPUSES.

A. College Campuses are Increasingly Becoming Places of Academic Repression, not Academic Freedom.

Colleges and universities are intended to be the ultimate bastions of free speech, free thought, and free expression in a democratic society. Increasingly, however, American universities are betraying their heritage and, in the case of public universities, violating the civil rights of students and professors by enforcing ideologically narrow and rigid views through censorship, double standards, and a judicial system devoid of due process.

In the last several years, the instances of repression of free thought and speech have increased. Perhaps the best known example is the 1993 "water buffalo" incident, in which a University of Pennsylvania student was charged with racial harassment for calling a group of rowdy students "water buffalo," despite the fact that the term has no racial connotation. However, since that time the instances of repression and abuse of authority have only increased. Many of these cases have been well documented by *amicus* and by one of the counsel for *amicus*, including:[2]

---

[2] These cases were investigated and verified by *amicus* as part of its mission to expose threats to free speech and academic freedom. They are archived at www.thefire.org. *See also* Alan Charles Kors and Harvey A. Silverglate, *The Shadow University: The Betrayal of Liberty on American's Campuses* (New York: The Free Press, 1998).

July 2000. A professor at Monterey Peninsula College is denied permission to teach a class because he failed to address the requirement that he "include a description of how course topics are treated to develop a knowledge and understanding of race, class and gender issues," a requirement for all classes, including math and science classes.

October 2000. The Cardozo Professor of Jurisprudence at Columbia University was informed by the Law School Dean that an exam question in his criminal law class was possibly "unlawful" because it may have violated "harassment" law and discriminated against women by creating a "hostile environment."

March 2001. The Bucks County Community College institutes a loyalty-oath-like requirement that applicants for teaching positions "provide a brief statement of your commitment to diversity and how this commitment is demonstrated in your work."

March 2001. The Young Americans for Freedom at Penn State University have the phrase describing rights as "God-given" removed from their constitution because this phrase is deemed "discriminatory" by the Penn State administration.

March 2001. A world-renowned poet and professor at the University of Alaska, Anchorage, is subject to investigation by university officials after publishing a poem titled "Indian Girls" about sexual abuse of children.

October 2001. A Vice-Provost at Penn State University condemns a professor's web-published opinions about American foreign policy as "insensitive" and "intimidating."

Intimidating speech is grounds for discipline at Penn State.

October 2001. A San Diego State University student is charged with abusive behavior after challenging the opinions of fellow students who expressed delight about the terrorist attacks of September 11.

October 2001. After a University of New Mexico professor jokes about the September 11 attacks, the University President investigates and disciplines the professor.

October 2001. Central Michigan University students are ordered to remove patriotic posters from their dorm rooms because an administrator deemed them "offensive."

October 2001. An Orange Coast College professor is suspended after he argued that silence on crimes against Christians and Jews in the Middle East was consent to terrorism.

December 2001. After receiving a student email that blamed the United States for bringing on the September 11th terrorist attacks, a University of North Carolina-Wilmington professor responded with a one-paragraph reply stating that the opinions were "undeserving of serious consideration." The student claimed the email was harassing, and the university responded by investigating the professor and requiring him to reveal all of his email correspondence on the subject.

December 2001. The University of South Florida officially begins the termination process of a tenured professor because outside criticism of his views caused a "disruption" to the university.

February 2002. A policy that restricts Free Speech to two small "free speech zones" on the public campus of West Virginia University is publicly exposed.

April 2002. After questioning University-sponsored mandatory diversity training, professors at the University of Alabama are investigated by the Faculty Senate because they had allegedly "interacted with members of the Legislature to attempt to lessen the legislative appropriation which the University receives."

May 2002. A University of South Carolina professor mandates certain "guidelines for discussion" requiring class participants to profess to certain political beliefs.

These cases amply illustrate that administrators on the campuses of our nation's universities have not hesitated to suppress speech and mandate orthodoxy in the face of the First Amendment. Should the decision of the Ninth Circuit Court of Appeals stand, the Courts would, in essence, be granting permission for university administrators to stifle Free Speech under the guise of "pedagogical concern." Such a result would be disastrous to the concept of liberty upon which the leading public universities were founded and which in significant measure has accounted for their enormous success.

B. The Traditional Role of Colleges and Universities as Bastions of Free Expression is Threatened by the Ninth Circuit's Extension of *Hazelwood*.

Colleges and universities in the United States have been the source of much of the critical thinking on public policy questions, especially during the twentieth century.

Richard Hofstadter, a leading U.S. historian of the twentieth century, declared, "No one can or should underestimate the contributions of research to American life, nor the ideas which university scholars have given to the material and intellectual well-being of our society." Richard H. Hofstadter, The Development of Higher Education in America, in *The Development and Scope of Higher Education in the United States* 66 (Richard H. Hofstadter & C. DeWitt Hardy eds., 1952). Similarly, Arthur M. Cohen wrote in his sweeping survey of American higher education history, "The Enlightenment dream was that debates on justice and equity would take place in a public arena, that an ever-evolving quest for truth would replace tradition. Research, experimentation and rational inquiry in the universities fit the dream." Arthur M. Cohen, *The Shaping of American Higher Education: Emergence and Growth of the Contemporary System* 129 (1998). Arthur O. Lovejoy, one of the founders and early leaders of the American Association of University Professors, observed in the 1930 edition of the Encyclopedia of Social Sciences that the ultimate social good of a university "is rendered impossible if the work of the investigator is shackled by the requirement that his conclusions shall never seriously deviate from the generally accepted beliefs or from those accepted by the persons, private or official, through whom society provides the means for the maintenance of universities" (quoted in William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 L. & Contemp. Probs. 79, 87 (1990)).

This Court has unequivocally held that there is "no doubt that the First Amendment rights of speech and association extended to campuses of state universities."

Widmar v. Vincent, 454 U.S. 263, 268-69 (1981). One of the first and best expressions of this protection came in 1957, in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), in which the Court, seeking to protect the sanctity of the teaching process from the depredations of the state's efforts to coerce professorial conformity and expressions of loyalty during the McCarthy era, reversed a professor's contempt citation. In doing so, the Court made clear its displeasure with the intrusion into the teaching process and into the professor's conscience and views. The Court stated that the "essentiality of freedom in the community of American universities is almost self-evident. . . . Scholarship cannot flourish in an atmosphere of suspicion and mistrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy*, 354 U.S. at 250. "To impose any strait jacket upon the intellectual leaders of our colleges and universities," warned the Justices, "would imperil the future of our Nation." *Id.*

Justice Felix Frankfurter wrote a concurring opinion in which he criticized the then-politically correct justification the state had asserted for wielding powers of inquiry and intimidation over academics – the notion that interference with academic freedom could occur "in a limited area in which the legislative committee may reasonably believe that the overthrow of existing government by force and violence is being or has been taught, advocated or planned." This "governmental intrusion into the intellectual life of a university" created such "grave harm," Justice Frankfurter warned, that this purported justification for repression was inadequate. He stressed "the dependence of a free society on free universities" and

decried the state's "intervention . . . that inevitably tends to check the ardor and fearlessness of scholars." *Sweezy*, 354 U.S. at 261-62 (Frankfurter, J., concurring).

Subsequent cases decided by this Court followed Justice Frankfurter's lead and adopted the rationale that First Amendment rights combined with academic freedom assure the highest level of protection to those on public college and university campuses. This fundamental principle was set down in 1967 in *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967). In that case, this Court struck down New York's teacher loyalty laws, noting "our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." 385 U.S. at 603. Similarly, *Healy v. James*, 408 U.S. 169 (1972) unanimously upheld the speech and associational rights of radical student members of a chapter of Students for a Democratic Society, observing that "state colleges and universities are not enclaves immune from the sweep of the First Amendment" and "reaffirming this Nation's dedication to safeguarding academic freedom." In 1995, this Court addressed viewpoint-based restrictions in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995). There this Court held that the funding of groups other than those with religious viewpoints cast disapproval on particular viewpoints and was thus unconstitutional.

The modern Supreme Court has been remarkably consistent in its protection of even the most offensive speech. *See, e.g., Terminiello v. Chicago*, 337 U.S. 1 (1949) (anti-Semitic ranting that "induces a condition of unrest" and "even stirs people to anger"); *Street v. New York*, 394 U.S. 576 (1969) (flag-desecration accompanied by the words "we don't need no damned flag"); *Cohen v. California*, 403 U.S. 15 (1971) (the words "Fuck the Draft" printed on the back of a young man's jacket, worn in a courthouse during the Vietnam War); *Gooding v. Wilson*, 405 U.S. 518 (1972) (the words "White son of a bitch, I'll kill you," uttered by a young man to a police officer at an antiwar protest at an army induction center); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973) (the phrase "Motherfucker Acquitted" in a headline in a student newspaper, written by a graduate journalism student who was ordered reinstated in the university.)

As Justice Robert Jackson wrote for the majority of the U.S. Supreme Court in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), a judgment that remains the law of the land: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what will be orthodox, in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith [in it]."

Should the opinion of the Ninth Circuit Court of Appeals stand, the students and faculty members of the nation's institutions of higher education will no longer be free to express their opinions when critical of their academic or administrative superiors and supervisors. They will be forced to submit to the orthodoxy of the moment, and to refrain from criticism bearing on how their universities

are governed and operated, on pain of punishment from petty administrators. This would betray the purpose of these great institutions and the understanding of the First Amendment. Because this issue affects every student and professor at every public college and university, there is an overriding national urgency to how this question is resolved. The Court should grant the petition in order to address and resolve this important issue.

C. The Ninth Circuit's Decision Permits Unconstitutional Viewpoint Discrimination and Eliminates a Time-Honored Forum for Opinion in Academic Work.

There can be no serious doubt that the Respondents' disapproval of the Petitioner's "disacknowledgements" section of his thesis was a viewpoint-based judgment that criticism of the university's faculty and administration, as well as certain political figures, disqualified the thesis-writer from having his academic work accepted. The Ninth Circuit took the position that the disacknowledgements section turned the thesis into a "nonconforming" thesis and that the thesis committee was within its right and powers – indeed, had its own right of academic freedom – to condemn it and refuse to issue the degree. *Brown v. Li*, 308 F.3d 939, 952 (2002). The panel concluded that the thesis committee had the right and the power to insist that if a student includes an acknowledgement section in his thesis, as the rules allow him to do, the thesis committee may dictate the point of view in that acknowledgement section:

> Plaintiff argues that he has a First Amendment right to draft an acknowledgements section from *any* viewpoint. To the contrary, *Hazelwood* and

> *Settle* establish that – consistent with the First Amendment – a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose.

Id. at 953.

It is axiomatic, and surely a matter for judicial notice, that an "acknowledgements" section of a thesis, as of any book, is reserved for the author's mentioning and acknowledging people and institutions that played a critical role, positive or negative, in the author's ability to complete the project. It is hardly a part of the *academic* product, but rather the *personal opinion* of the author as to who was, and who was not, helpful to his enterprise. The panel majority nonetheless paints this exercise as part of the academic undertaking, and endows the thesis committee with the power to approve, or disapprove, the author's viewpoint. This power is said to serve "a legitimate pedagogical purpose." In other words, the thesis committee and the university administration have the power to censor the student's criticisms of the university and its faculty and administration, and even his criticism of the state's governor, under the rubric "legitimate pedagogical purpose." If so, these Respondents are the only governmental figures in our society so endowed with such an extraordinary power – to punish a citizen who criticizes them, and to get away with it because they are teachers and academic administrators. Certainly the First Amendment allows for no such gaping hole in its coverage – and surely not at the college and university level, even if *Hazelwood* arguably might endow administrators with some degree of such power at the secondary or elementary

school level. And surely this Court must not allow such a perverse result as is reached here – that academic freedom actually endows public academic administrators with the power to shut-off student criticism of their performance. This surely turns the concept of academic freedom on its head; it turns the concept into a weapon for censorship rather than a shield against it.

That this case demonstrates viewpoint discrimination is clear from this record. The record is replete with examples of acknowledgement sections that were allowed. Indeed, an acknowledgement section is very common in the academic world, and in the world of publishing in general. It is beyond doubt, on the basis of this record and even on the basis of the panel's opinion, that had Petitioner sung the praises of the university faculty and administration, and of the educational policies of the governor of California, his thesis would have been approved without a moment's hesitation. The academic portion of the thesis, after all, had been approved before the faculty committee noticed the disacknowledgements section tacked onto the final version submitted to the library. It was only when the committee members learned of the student's criticism of them and their academic and political colleagues that they balked. It is hard to find a clearer example of viewpoint-based censorship of protected opinion. And yet this exercise in the bald use of power to censor criticism is justified by the panel under the guise of academic freedom and "legitimate pedagogical purposes." There is an Orwellian aspect to such reasoning that is difficult to escape.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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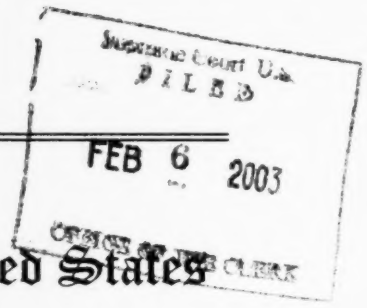

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment's free speech guarantee prohibit public university faculty from assigning and grading student academic work?

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STATEMENT OF THE CASE

University of California at Santa Barbara ("UCSB") rules place the responsibility for certifying that a master's degree candidate has met degree requirements on the candidate's faculty thesis committee. Excerpts of Record ("ER") at 62. The committee members and the candidate are made jointly responsible for the entire contents of the candidate's master's thesis, satisfactory completion of which is the primary requirement for the degree. Supplemental Excerpts of Record ("SER") at 32. The rules provide that theses and dissertations must meet norms for publication in the candidate's field of study. SER at 32, 63. These criteria apply to the acknowledgements sections, the content of which is strictly regulated in the world of scientific publication. Undisputed testimony in the record established that acknowledgments are important sections in scientific papers that are limited to (generally brief) recognition of individuals or entities that provided help or financial support for the research contained in the publication. SER at 84-85, 88, 93, 96, 106, 110-11, 135-36, 150-54, 161-62, 164; *see also* Petition for Certiorari ("Pet.") Appendix ("Pet. App.") at 7-8 (citing scientific style manuals). The University's rules explicitly adopt these standards stating that an acknowledgment, although optional, is "to acknowledge particular persons who helped you." SER at 35.

University rules further require that the members of the faculty thesis committee sign a statement, which must appear on the second page of the thesis, indicating that they approve the thesis. SER at 35. Candidates are required to submit, or "file," the approved thesis with the UCSB Davidson Library as a condition of conferral of the degree. SER at 32.

In the spring of 1999, Petitioner, a master's degree candidate in the UCSB Department of Materials Science, presented his thesis, without any acknowledgement or dedication, to the members of his thesis committee for approval. Each of them signed the approval page. Subsequently, Petitioner altered the thesis by including, immediately after the signed approval page, a profanity-laced two-page statement, titled "Disacknowledgments," in which he criticized various University officials, the former California Governor, the U.C. Regents, and "Science." ER at 39-40. In June 1999, without the consent or knowledge of the thesis committee, Petitioner filed the altered thesis in the library as if the committee had approved it. The committee members discovered that Petitioner had altered the thesis, and they refused to approve the addition of the Disacknowledgments. All three committee members agreed that the content, form, and presentation of the "Disacknowledgments" did not meet professional publication standards. Furthermore, they did not want to associate their names with the "Disacknowledgments" by signing approval of a thesis that included it. Petitioner, on the other hand, refused to file the *approved* thesis in the library, as required to obtain his degree.

Instead, Petitioner brought a series of University grievances and appeals challenging the committee members' refusal to approve the "Disacknowledgments." Petitioner's grievance was unanimously rejected in turn by the Materials Department's Academic Affairs Committee, the Associate Dean of the Graduate Division, the Graduate Council, and the campus Academic Freedom Committee. *See* SER 129, 163, 165. These bodies all concluded that, like any scientific paper, a master's thesis – including its acknowledgements section – is subject to rigorous editorial

review, in this case by the thesis committee. They also concluded that the Petitioner's "Disacknowledgments" violated professional publication standards and that the committee members therefore properly refused to approve it. Petitioner was not disciplined for the "Disacknowledgments" and was, on the contrary, repeatedly informed that he was free to publish his views in any manner he wished.[1] He was told, however, that he would not be awarded the degree unless he filed a version of the thesis approved by his committee in the library as University rules require.[2] Alternatively, Petitioner was given the option of finding faculty members willing to form a new committee and approve the thesis in the form in which Petitioner wished to submit it. SER 129.

Petitioner filed this action on June 16, 2000. His complaint asserted damages claims against the members of his thesis committee, the Dean of the UCSB Graduate Division, and the Chancellor of UCSB in their personal capacities for alleged violations of his free speech and due process rights under the U.S. and California Constitutions. He also asserted a claim for prospective injunctive relief against the same defendants and the UCSB Librarian in

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[1] As noted in the Petition, shortly after the Petitioner's alteration of the thesis was discovered, the Dean of Students, who is responsible for student discipline on the campus, demanded that Petitioner remove the "Disacknowledgments" and that he apologize to the individuals whom he had attacked. However, shortly afterward the University revoked the Dean of Students' letter and indicated that it did not represent the position of the University. SER at 172. Petitioner did not sue the Dean of Students

[2] The University ultimately awarded Petitioner his degree rather than disqualify him when a deadline for him to earn the degree or face academic disqualification was about to expire. *See* Pet. App. at 13-14.

their official capacities which sought to compel them to place his thesis, with the "Disacknowledgments" in the UCSB Library's public collection. The district court granted defendants' motion for summary judgment on all claims. On appeal, the Ninth Circuit Court of Appeals affirmed the district court's judgment as to the federal claims. It concluded that the district court had not expressly ruled on the Petitioner's state law claims and therefore remanded those claims to the district court with instructions either to dismiss them under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), or address them on the merits. Pet. App. at 3, et seq.

REASONS FOR DENYING THE PETITION

The Petition challenges a holding that is both narrow and unsurprising:[3]

> [A]n educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment. . . . [T]he First Amendment does not require an educator to change the assignment to suit the student's opinion or to approve the work of a student that, in

[3] The Petition does not challenge the court of appeals' ruling on Petitioner's due process claim and does not discuss its ruling with regard to his claim for prospective injunctive relief. Addressing the latter claim would require the Court to resolve the entirely separate issue of whether Petitioner has the right to require a public library to acquire his writings. *See Board of Education v. Pico*, 457 U.S. 853, 871 (1982) (plurality). Nor, of course, does Petitioner challenge the lower court's remand of the state law claims.

> his or her judgment, fails to meet a legitimate academic standard.

Pet. App. at 20. Petitioner's hyperbolic warnings about the implications of the court of appeals' decision (*see* Pet. at 17-18) find no basis in this limited holding.[4] The decision below does not permit university faculty or administrators to restrict student speech on campus, to punish students for expressing their views or for criticizing faculty or administrators. Nor does it "diminish[] the free speech rights of . . . university students . . . to the rights held by high school students." *See* Pet. at 17.[5] The decision below holds only that university faculty may lawfully assign and grade student academic work.

That common-sense holding requires no further review from this Court. First, it creates no "conflict" since no court has ever held that the First Amendment prohibits faculty from issuing and grading student assignments. The supposed "conflicting" court of appeals' decisions

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[4] Even worse is the absurdly off-point Brief of *Amicus Curiae* which fulminates against alleged free speech violations in the Academy but barely stops to address *this* case and addresses not at all the limited holding of the court below.

[5] Petitioner's stated "Questions Presented" depend on inaccurate assumptions about the facts of this case. Both Petitioner's Questions assume that Petitioner was "punished" for his speech, and his second Question assumes that there "is no question that the student fulfilled all requirements for the degree." But Petitioner was never "punished," nor did he fulfill the degree requirements; defendants simply refused to confer a degree on Petitioner when he had not *earned* it by filing an approved thesis in the University library as required by University regulations. In *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978), this Court distinguished between disciplinary action and academic evaluation, a distinction that would be meaningless if the natural consequences of a poor academic evaluation constituted "punishment."

Petitioner cites, to the extent they address the question at all, actually *support* the lower court's holding. Second, the decision does not conflict with this Court's jurisprudence which makes clear that evaluation of assigned student academic work is not a violation of the First Amendment rights of the student. Finally, there are alternative grounds for the court of appeals' decision that would prevent this Court from even reaching the questions Petitioner posits. The Petition should be denied.

I. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH DECISIONS OF THE FIRST AND SIXTH CIRCUITS

The Petition's core argument is a challenge to the court of appeals' application in the university context of the deferential standard set forth in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, this Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.[6] While Petitioner attempts to pitch this case as an opportunity for the Court to speak broadly on the application of *Hazelwood* in higher education, it is not. The court below concluded that "*Hazelwood* provides a workable standard

[6] As Petitioner notes, in *Hazelwood*, the Court reserved the question whether to apply "the same degree of deference" to educators' judgment "with respect to school-sponsored expressive activities" such as newspapers and dramatic performances "at the college and university level." 484 U.S. at 273 n.7.

for evaluating a university student's First Amendment claim stemming from *curricular speech*." Pet. App. at 25 (emphasis added). The court of appeals' limitation of its holding to curricular speech, and the distinction it drew between curricular and extra-curricular student expression, are central to its decision. *See* Pet. App. at 21. Petitioner's contention that the decision below conflicts with decisions from the First and Sixth Circuits is wrong because it ignores this critical limitation.

In *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001) (en banc), the Sixth Circuit addressed a First Amendment claim brought by two college yearbook editors who challenged college officials' confiscation of their yearbook, *The Thorobred*, before it could be distributed to the student body. The Sixth Circuit held that the yearbook was a limited public forum and that the college's suppression of the yearbook was arbitrary, unreasonable and therefore actionable. In reaching this holding, the Sixth Circuit distinguished *Hazelwood* – which held that a high school newspaper was *not* a public forum – on a number of grounds, grounds that also differentiate *Kincaid* from this case. For example, the Sixth Circuit discussed at length the fact that – in marked contrast to both *Hazelwood* and this case – college rules *prohibited* faculty control over the content of the yearbook. *See Kincaid*, 236 F.3d at 349-50. Most important, the Sixth Circuit expressly recognized the distinction between curricular and non-curricular speech relied on by the court of appeals below: "Nor is *The Thorobred* a closely-monitored classroom activity in which an instructor assigns student editors a grade, or in which a University official edits content. *See Hazelwood*, 484 U.S. at 268-69, . . ." *Kincaid*, 236 F.3d at 352. In contrast, Petitioner's thesis *was* a closely-monitored academic activity in

which the instructors assigned grades ("approved" or "not approved") and in which they were *required* by University rules to assume responsibility over content.[7]

In *Student Government v. Bd. of Tr. of the Univ. of Mass.*, 868 F.2d 473 (1st Cir. 1989), the First Circuit held that the First Amendment does *not* prohibit a university from withdrawing support for the university's Legal Services Office. The parties had argued about whether the Legal Services Office could be considered a "public forum." In describing the factors that determine whether a forum is public, the First Circuit stated in a footnote that *Hazelwood*, "in which the Court held that a high school newspaper whose production was part of educational curriculum was not a public forum, is not applicable *to college newspapers*." *Student Government v. Bd. of Tr.* at 480 n.6 (emphasis added). First, this statement is pure *dictum*. The First Circuit ultimately decided that forum analysis was altogether inapplicable to the facts presented by the case, *id.* at 476-77 & 480, so it never reached the question whether there was a "public forum" nor did it need to decide whether *Hazelwood* applies in the college context.[8]

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[7] Indeed, the Sixth Circuit's jurisprudence makes clear that faculty have extensive authority to assign and grade student work. *See Settle v. Dickson County School Bd.*, 53 F.3d 152, 155 (6th Cir. 1995) ("So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere."); *Parate v. Isibor*, 868 F.2d 821, 828-30 (6th Cir. 1989) (holding that a university professor has a First Amendment right to assign grades and evaluate students as determined by his independent professional judgment).

[8] The First Circuit's holding regarding the inapplicability of forum analysis supports the Ninth Circuit decision, which also found forum

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Second, even this dictum does not conflict with the decision below. It expressly applies only to "college newspapers." It does not purport to create a constitutional right for students to be free from faculty review and evaluation of the contents of their assigned *academic* work.[9]

II. THE COURT OF APPEALS' DECISION IS IN COMPLETE ACCORD WITH THE DECISIONS OF THIS COURT

In *Hazelwood*, this Court recognized that the degree of control the Constitution permits educators to exercise over student speech depends on the nature and context of the speech involved. At one end of the spectrum, where educators' control is most limited, are cases such as *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969) and *Papish v. University of Missouri*, 410 U.S. 667 (1973), which "address[ ] educators' ability to silence a student's personal expression that happens to occur on the school premises." *Hazelwood*, 484 U.S. at 271 & n.3. In contrast, *Hazelwood* held educators have far more control over "expressive activities that students, parents, and members

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analysis inapplicable. Pet. App. at 29 and n.5. Forum analysis applies in "determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 800 (1985). Because this case involves evaluation of academic work rather than access to government property – real or otherwise – forum analysis is not pertinent. The Petition does not contest this conclusion.

[9] It is also worth noting that the only support the First Circuit offered for its statement was footnote 7 from the *Hazelwood* opinion in which this Court *declined to decide* whether the decision was applicable to college newspapers. 484 U.S. at 273 n.7.

of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. Unlike the speech involved in *Tinker* and *Papish* "[t]hese activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.*

As this passage from *Hazelwood* suggests, the paradigm case of maximum control by educators is speech that is not merely "fairly . . . characterized" as part of the school curriculum but is central to the curriculum and does occur "in a traditional classroom setting." Thus, in *Hazelwood*, the Court found compelling the fact that the speech at issue involved course work "taught by a faculty member during regular class hours" in which "[s]tudents received grades and academic credit" and was part of "the educational curriculum." *Id.* at 268.[10] Indeed, the Court has treated the control of educators over required curricular speech and content as virtually a given. *E.g., Board of Education v. Pico*, 457 U.S. at 862 ("Our adjudication of the present case thus does not intrude into the classroom, or into the compulsory courses taught there.") (Plurality opinion).

Furthermore, the Court has repeatedly emphasized the importance of academic discretion and judicial nonintervention when the "control" being exercised is merely

[10] Petitioner's assertion that the court of appeals' "distinction between curricular and extracurricular cannot be reconciled with this Court's ruling in *Hazelwood*" (Pet. at 11) is unfathomable; that distinction is essential to *Hazelwood's* reasoning.

the direction and evaluation of student academic work. "'The determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board, (citation omitted) rather than with the federal courts.'" *Hazelwood*, 484 U.S. at 267; *see also Board of Regents v. Southworth*, 529 U.S. 217, 232 (2000) ("It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."). "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment." *Id.*; *see also Univ. of Pennsylvania v. EEOC*, 493 U.S. 182, 199 (1990) (same). This is true, in part, because "the decision of an individual professor as to the proper grade for a student in his course, . . . requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making." *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978).

The reasons courts have recognized the need for educators to assign and evaluate student curricular speech are almost too obvious to recite. Assignment of projects is an essential tool by which teachers shape the curriculum. Assigning students to "speak" on particular topics or even to defend specific viewpoints can have important educational benefits. As the court of appeals pointed out (Pet. App. at 29), faculty may, for example, seek to encourage

critical thinking by requiring students to write papers defending particular arguments or adopting particular perspectives.[11] Faculty must also be able to evaluate student work both to provide students feedback on their performance and to maintain academic standards. Out of misplaced concern for students' rights to say whatever they want in their curricular speech, Petitioner would create a constitutional prohibition against the faculty's use of traditional academic tools that would result in abolition of curriculum and academic standards. In the end, it is students who would be the losers.

Contrary to Petitioner's argument for reduced faculty control over curriculum at the university level, this Court's decisions show that the need for educators to direct and evaluate student academic speech is, if anything, greater as students move up the academic ladder. This Court has expressly recognized the importance of faculty discretion in controlling curriculum and defining academic standards in the higher education context in such cases as *Ewing, Southworth,* and *Horowitz*. Moreover, there is no logical reason why faculty control and discretion over academics would be more important in primary and secondary schools than in colleges and universities. Quite the contrary. As this

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[11] Petitioner dismisses the court of appeals' argument by claiming that "in this case" he "was not given an assignment to write his thesis from a particular viewpoint as part of a class exercise." Pet. at 11 n.12. That statement, at least with regard to the "Disacknowledgments" at issue, is inaccurate since University rules do require acknowledgments "to acknowledge particular persons who helped you." SER at 35. But even if Petitioner were factually correct, he cannot dispute that the rule he urges this Court to adopt would prohibit faculty from assigning students papers that are to be written from a particular viewpoint.

Court recognized in *Horowitz*, "as one advances through the varying regimes of the educational system, and the instruction becomes both more individualized and more specialized." 435 U.S. at 90. The highly specialized nature of the curriculum and the substantive expertise of the faculty in the subject-matter taught makes judicial intervention into University curricular decisions even more unwise than in primary and secondary schools where curriculum is often standardized and where its substantive content is more accessible to non-specialists. *See id.*

Petitioner argues that one of the factors that justified suppression of the newspaper stories at issue in *Hazelwood* – protection of an emotionally immature audience from exposure to inappropriate material – is inapplicable in the context of higher education. Pet. at 13-16. This argument attacks a strawman; defendants have never sought to justify their actions on the basis of protecting the student body from exposure to inappropriate material. Defendants did not, for example, prohibit Petitioner from publicly distributing his "Disacknowledgments" to the UCSB student body. Whether or not the particular "legitimate pedagogical concern" that justified suppression of the student paper in *Hazelwood* is applicable in a post-secondary setting, the educational concern at issue in *this* case – in the words of the Department of Materials Academic Affairs committee "teaching the student how to write a proper scientific paper" (ER at 45) – is clearly applicable, if not more important, in the university context.

The court of appeals' decision recognized that this is the paradigm case for maximum faculty control over student speech: it involves faculty review and control of required student academic work. Petitioner was given an

assignment – to write a master's degree thesis that met standards for publication in the field of materials science. Petitioner's thesis committee refused to give the thesis, with "Disacknowledgements," a passing grade because they believed did not meet the University's academic criteria, a decision that was upheld by multiple levels of academic review. The court of appeals was therefore correct to employ the deferential standard announced by this Court in *Hazelwood* which requires only that defendants show that "their actions are reasonably related to legitimate pedagogical concerns." Pet. App. at 18, *quoting Hazelwood*, 484 U.S. at 273. The court of appeals' application of that standard was straightforward. It determined, in accord with the undisputed evidence in the record, that requiring masters' theses, including acknowledgments sections, to comply with professional publication standards was "reasonably related" to a "legitimate pedagogical concern" – specifically, teaching a student how to write a proper scientific paper. Pet. App. at 26. The undisputed evidence also showed that the "Disacknowledgments" did not comply with professional publication standards.[12]

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[12] Petitioner contests this conclusion, contending that – contrary to the express provisions of the University's written policies requiring that theses meet professional publication standards and that acknowledgements "acknowledge particular persons who helped you," SER at 35 – some students had used their acknowledgments as a forum for personal expression of views unrelated to the subject of their thesis. First, the record does not support that claim. While some of the acknowledgments Petitioner submits (which represent a fraction of a percent of theses and dissertations at UCSB) are lacking in focus or resort to humor, the great majority in fact comply with the requirement that they "acknowledge particular persons who helped you." Indeed, it appears that Petitioner has identified only one other acknowledgment in all the thousands filed at UCSB (the one quoted in footnote 2 of his Petition)

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III. THE PETITION RAISES NO ISSUE OF NATIONAL IMPORTANCE REQUIRING RESOLUTION BY THIS COURT

The decision of the court of appeals narrowly holds only that faculty at public universities may direct and evaluate student curricular speech when there is a legitimate pedagogical reason to do so. It does not limit the rights of students to speak on campus, to criticize their universities or their administrators, or to publish whatever they want in student newspapers. Nor does it restrict the access of university students to speech on any subject. Rather, it simply recognizes that, in the limited context of students' assigned academic work, faculty must have the authority, subject to only the most limited judicial oversight, to assign and grade student speech. Thus, the decision below means only that, without violating the Constitution, faculty *may* dictate student academic assignments; *may* grade, in part, on how well students comply with the assignment; and *may* impose educationally reasonable standards on student papers such as the requirement that they meet professional publication norms.

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that, like his, contains an airing of grievances. Second, as the court of appeals noted, the existence of a few non-conforming acknowledgments would not create an issue of fact because the thesis committee was entitled to set its own academic standards and certainly entitled to conform to the written standards set out by the University, even if other committees had not. Pet. App. at 28-29. The mere fact that a faculty committee might have applied lower standards in the past does not give a subsequent student a constitutional right to application of the same low standard. The First Amendment does not mandate grade inflation.

None of this is radical or new. Faculty and students have for generations assumed that teachers may lawfully direct and grade student academic assignments. Our educational system is based on that assumption. There is no need for this Court to affirm that principle, and certainly no need or basis to overturn it. Nor does there appear to be any great wave of cases challenging the well-accepted roles of faculty and students in the assignment and evaluation of student work that calls for guidance from this Court. There is no need for this Court to address the issues supposedly raised by this Petition.

IV. THIS IS AN INAPPROPRIATE CASE FOR ADDRESSING THE ISSUES RAISED IN THE PETITION

Petitioner fails to address two independent grounds for the Ninth Circuit's decision that would likely prevent this Court from even reaching the First Amendment questions on which Petitioner seeks review. First, the Petition largely ignores the fact that the summary judgment ruling that led to this appeal was (at least with regard to the questions raised by the Petition) a ruling on the defendants' *qualified immunity defense* and that the court of appeals' decision was explicitly based on qualified immunity. *See* Pet. App. at 16, 29. To prevail in the face of a qualified immunity defense, Petitioner must demonstrate not only a violation of his rights, but also that the right violated was "clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. Given that two federal courts have now found

defendants' conduct lawful, it is inconceivable that a "reasonable officer" should have concluded that same conduct was clearly unlawful. Accordingly, this Court's review could not possibly alter the outcome of the case, making it an inappropriate vehicle for addressing Petitioner's questions.

Second, as discussed above, University regulations require that thesis committee members personally endorse approval of the thesis by signing its second page. This requirement implicates the First Amendment right of the *committee members* to refuse to associate with speech with which they disagree as recognized in numerous of this Court's cases. *E.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."); *Pacific Gas & Elec. v. California P.U.C.*, 475 U.S. 1, 15 (1986) (compelling utility to include a consumer organization's literature in its billing envelopes "impermissibly requires [utility] to associate with speech with which [it] may disagree"); *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 573 (1995) (state "may not compel affirmance of a belief with which the speaker disagrees"). The members of Petitioner's thesis committee had a clear right to disassociate themselves with the "Disacknowledgments" by refusing to sign their names approving any thesis that contained it.[13] The court below expressly

[13] Petitioner has argued that the committee members could have added a "disclaimer" in their approval stating that they did not agree with the sentiments expressed in the "Disacknowledgments." First, University rules make no provision for such a "partial" approval of a thesis. Opening up such a possibility would seriously undermine the very purpose of thesis committee approval which is to place the

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recognized this right as an alternative basis for its holding. Pet. A-26. In light of the independent rights of his faculty committee members to decline approval of the thesis, this Court would not even reach the questions Petitioner presents.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court deny the Petition.

Dated: February 6, 2003

Respectfully submitted,

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imprimatur of the faculty members – and in a concrete way to stake their reputations – on the quality of the student's work as a means of maintaining high academic standards. Second, this Court has held that the ability of an unwilling speaker to issue a disclaimer does not cure the violation of his rights that results from forced association with speech of another. As the Court noted in *PG&E*, forcing a utility to include consumer group's literature in its mailings forces the utility "either to appear to agree with TURN's views or to respond. (Citation omitted.) That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. (Citation omitted.) For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Pacific Gas & Elec.*, 475 U.S. at 15-16.